(10)

No. 92-938-CFX Title: Maurice Rivers and Robert C. Davison, Petitioners
v.
Roadway Express, Inc.

Docketed: December 2, 1992 Court: United States Court of Appeals for the Sixth Circuit

Vide:
92-757

Entry	Date	Proceedings and Orders
	Dec 2 1992	Petition for writ of certiorari filed.
	Dec 3 1992	Motion of petitioners to have petition for writ of certiorari considered with other pending petitions filed.
	Jan 4 1993	Brief of respondent Roadway Express, Inc. in opposition filed.
	Jan 6 1993	DISTRIBUTED. February 19, 1993
	Jan 13 1993	REDISTRIBUTED. February 19, 1993
	Jan 21 1993	Brief of respondent Roadway Express in opposition to the motion for joint consideration filed.
	Feb 10 1993	Letter from counsel for the respondent received and distributed.
	Feb 16 1993	Letter from counsel for the respondents received and distributed.
	Feb 22 1993	Petition GRANTED. limited to Question 1 presented by the petition. The case is consolidated with No. 92-757, Landgraf v. USI Film Products, and a total of one hour is allotted for oral argument.
		**********
	Mar 23 1993	Order extending time to file brief of petitioner on the merits until April 30, 1993.
	Apr 30 1993	Brief amici curiae of National Women's Law Center, et al. filed.
	Apr 30 1993	Brief amici curiae of NAACP, et al. filed.
	Apr 30 1993	Brief amici curiae of United States, et al. filed. VIDED.
	Apr 30 1993	Brief of petitioners Maurice Rivers, et al. filed.
	Apr 30 1993	Joint appendix filed.
	Apr 30 1993	Brief amici curiae of Asian American Legal Defense and Education Fund, et al filed. VIDED.
	May 12 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	May 14 1993	Motion of respondents for divided argument filed.
	May 24 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	May 24 1993	Motion of respondents for divided argument DENIED.
	May 24 1993	Record filed.
	May 25 1993	Record filed.
	May 28 1993	Order extending time to file brief of respondent on the merits until June 25, 1993.
	Jun 3 1993	Brief amicus curiae of Midwest Motor Express, Inc. filed. VIDED.

No. 92-938-CFX

Entry	Date	Proceedings and Orders
	Jun 25 1993	Brief of respondent Roadway Express, Inc. filed.
	Jun 25 1993	Brief of American Trucking Associations, et al. filed. VIDED.
	Jun 25 1993	Brief amici curiae of Equal Employment Advisory Council, et al. filed. VIDED.
	Jun 25 1993	Brief amicus curiae of Wards Cove Packing Co. filed. VIDED.
	Jul 16 1993	Application (A93-63) extension of time to file reply brief, submitted to Justice Stevens.
	Jul 20 1993	Application (A93-63) granted by Justice Stevens extending the time to file until August 20, 1993.
	Aug 10 1993	Reply brief of petitioners filed. VIDED.
	Aug 10 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT WEDNESDAY, OCTOBER 13, 1993.(1ST CASE).
	Oct 13 1993	ARGUED.

92-938

No. 92-

Supreme Court, U.S.
FILED
DEC 2 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM 1992

MAURICE RIVERS
AND
ROBERT C. DAVISON,

Petitioners,

V.

ROADWAY EXPRESS, INC.

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. Does the Civil Rights Act of 1991 apply to cases that were pending when the Act was passed?

2. Should this Court's construction of 42 U.S.C. § 1981 in *Patterson v. McLean Credit Union* be applied retroactively after it has been legislatively rejected by section 101 of the Civil Rights Act of 1991?

LIST OF PARTIES

The parties are the petitioners Maurice Rivers and Robert C. Davison and the respondent Roadway Express, Inc. James T. Harvis, Jr. was an appellant below in a separate appeal, his claims having been severed by the district court from those of Rivers and Davison and tried separately. Local 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America was a defendant in the district court, but the district court by order dated November 30, 1988 dismissed all claims against the defendant union, and that dismissal was not appealed. Neither Harvis nor Local 20 is a party to this petition.

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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

MAURICE RIVERS
AND
ROBERT C. DAVISON,

Petitioners,

V.

ROADWAY EXPRESS, INC.

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

Petitioners Maurice Rivers and Robert C. Davison respectfully pray that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 24, 1992. The Court of Appeals denied a timely petition for rehearing on October 13, 1992.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported as *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), and is set out at 1a-16a of the Appendix hereto ("App."). The order of the Court of Appeals denying respondent's petition for rehearing and for rehearing *en banc* is unreported and is

set out at App. 17a-18a. The opinion of the United States District Court for the Northern District of Ohio, Western Division, is unreported, and is set out at App. 19a-24a.

JURISDICTION

The decision of the Sixth Circuit was entered August 24, 1992. Respondent's timely petition for rehearing *en banc* was denied on October 13, 1992. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves sections 101, 109(c), 402(a) and 402(b) of the Civil Rights Act of 1991, 105 STAT. 1071, P.L. 102-166, which provide in pertinent part:

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended —

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 402. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

STATEMENT OF THE CASE

Petitioners Maurice Rivers and Robert C. Davison, experienced Black garage mechanics, seek *certiorari* on the issue whether section 101 of the Civil Rights Act of 1991 applies to their claims of race discrimination in employment against their former employer, Roadway Express, Inc. ("Roadway," "the Company"). Rivers and Davison worked successfully for Roadway from 1972 and 1973, respectively, until they were discharged in 1986. On August 22, 1986, without the contractually required prior written notice routinely provided to white employees, Roadway managers

told Rivers and Davison to attend disciplinary hearings on their accumulated work records. Both petitioners refused to attend because of the inadequate notice. Both were disciplined in their absence. They filed successful grievances complaining of the peremptory, racially discriminatory disciplinary proceedings. In retaliation for their success in the grievance proceedings, however, Roadway again convened disciplinary hearings, again without the requisite notice, and discharged the petitioners on September 26, 1986 after they refused to attend. App. 2a-3a.

The district court initially denied Roadway summary judgment on the race discrimination claims, but then dismissed petitioners' § 1981 discharge and retaliation claims based on this Court's subsequent decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). App. 23a-24a. The Court of Appeals for the Sixth Circuit reversed, and reinstated the claims of racially discriminatory retaliation. The Court of Appeals held that *Patterson* applies retroactively, but that the retaliation claims survive *Patterson* because § 1981 protects the right to "enforce contracts," and petitioners' "ability to enforce claimed contract rights was impaired because of their race." App. 8a. The Sixth Circuit thus remanded the retaliation claims for a jury trial, and directed a redetermination of the Title VII claims in light of the jury's verdict as required by *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). App. 9a-10a.

The Court of Appeals affirmed the dismissal of the claims of race discrimination in firing, however, on the ground that the Civil Rights Act of 1991 should not be applied to this case. App. 11a-14a. On remand under *Patterson*, as applied in this case by the Sixth Circuit, plaintiffs must prove race-based retaliation relating to their exercise of a contract right. App. 14a. If § 101 of the 1991 Act applied or if the decision in *Patterson* were held no longer to apply

retroactively, however, proof of race discrimination in any aspect of the employment relation would entitle the petitioners to relief.

Reasons For Granting The Writ

The question whether any provision of the 1991 Civil Rights Act applies to pre-Act claims has created a number of distinct conflicts in the Circuits. The Circuits are in conflict over whether the plain language of the 1991 Civil Rights Act commands its application to pending cases, because they disagree on the applicable rules of statutory construction. The Circuits are also in conflict over whether, if the statutory language is not determinative, the decisions of this Court create a presumption that § 101 of the Act applies. This conflict is so well developed that the Courts of Appeals have repeatedly expressly referred to it, and even requested clarification from this Court. Even among those courts holding § 101 presumptively inapplicable, there is a split over whether the question is properly analyzed as one of applicability of the 1991 Act as a whole, or whether it should be approached section by section. Finally, there is an unresolved question under this Court's own precedent whether, in light of the 1991 Act's repudiation of *Patterson*, that decision should continue to be applied retroactively to pending claims.

This case presents issues of great national importance. Hundreds of judicial decisions have grappled with the question whether the 1991 Act applies to pre-Act claims, and hundreds more have sought to apply the correct presumption regarding the applicability of other new statutes to pending

cases.[1] The conflicts in the law have led to inconsistent results among jurisdictions. Moreover, the United States government, in cases in the lower courts nationwide, is filing conflicting briefs, some supporting and other opposing a presumption that new legislation applies to pre-existing claims. If current experience is any guide, some civil rights cases filed prior to the 1991 Act will continue to be litigated for several years, and it is thus important for this Court to set forth clearly which legal standards will govern those cases.[2] The questions here presented must be resolved in order to ensure that the current inequities and waste of judicial resources not persist into the next decade.

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[1] Indeed, the Seventh Circuit in *Luddington v. Indiana Bell Telephone Co.* commented that the applicability of the 1991 Civil Rights Act was of such great importance that, even though it had already been decided by another panel of the Seventh Circuit, the *Luddington* panel would discuss it "as if it were an open question in this circuit, rather than, as we would ordinarily do, dispose of it with a citation to our recent decision." 966 F.2d 225, 226 (7th Cir. 1992).

[2] Employment discrimination cases unfortunately often take years to resolve. In the eight cases in which Supreme Court decisions were overturned by the 1991 Act, for example, the employment discrimination claim at issue was nine years old on average by the time the litigation reached this Court. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (plaintiff harassed 1972-1982, fired 1982); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 1642 (1989) (filed in 1974); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plaintiff denied partnership in 1982); *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991) (plaintiff dismissed in 1974); *Martin v. Wilks*, 490 U.S. 755 (1989) (original suit filed in 1974; disputed consent decree entered in 1981); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (seniority system adopted in 1979; plaintiff laid off in 1982); *West Virginia Univ. Hospitals v. Casey*, 111 S.Ct. 1138 (1991) disputed practice occurred in January 1986); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (Title VII complaints filed in 1976 and 1977).

Other petitions for *certiorari* have already been filed with the Court addressing the applicability of various provisions of the Civil Rights Act of 1991 to pending claims. *Baker v. Gulf & Western* No. 92-552 (11th Cir., cert. petition filed September 24, 1992); *Johnson v. Uncle Ben's*, No. 92-737 (5th Cir., cert. petition filed September 29); *Landgraf v. USI Film Products*, No. 92-757 (5th Cir., cert. petition filed October 28, 1992); *Kuhn v. Island Creek Coal Co.*, No. 92-787 (6th Cir., cert. petition filed November 3, 1992). This case is the best vehicle for deciding the common issues for at least three reasons. First, the largest segment of pending cases in the lower courts raising the question whether the 1991 Act applies are cases seeking application of § 101.[3] That is the provision at issue here, but it is not addressed in *Landgraf* or *Kuhn*. Second, the court below, unlike the courts in *Uncle Ben's* and *Landgraf*, analyzed the applicability of the 1991 Act as a whole, rather than section by section. Given the importance of the procedural or substantive nature of the individual statutory provision at issue to the determination whether the change applies to pre-Act claims, the decision of the court below reviewing the Act as a whole specially warrants review. Third, petitioner in *Landgraf* seeks application of the procedures and remedies afforded by the 1991 Act to claims that were fully adjudicated prior to the Act under then-current procedures and remedies. This case was reversed and a remand directed on other grounds, and therefore will be retried in any event, and application of the

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[3] *See, e.g., Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir., 1992); *Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 886 (D.C. Cir., 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir., 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225; *Mozee v. American Commercial Marine Svc. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 207 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

1991 Act's procedures and remedies is thus more appropriate here.

By separate motion, petitioners respectfully request that this petition be considered jointly with the petitions already filed in *Johnson*, *Baker*, *Landgraf* and *Kuhn*.

I. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER THE LANGUAGE OF THE CIVIL RIGHTS ACT OF 1991 REQUIRES ITS APPLICATION TO CASES PENDING AT THE TIME OF ITS PASSAGE

The Sixth Circuit in this case, as well as the Fifth, Seventh, Eighth, Eleventh and District of Columbia Circuits, have ruled that the language of the 1991 Civil Rights Act does not indicate whether it applies to pending cases. *Harvis v. Roadway Express*, App. 12a (following *Vogel v. City of Cincinnati*, 959 F.2d 594, 597 (6th Cir. 1992) *cert. denied*, _ U.S. __, 113 S.Ct. 86 (1992)); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d at 1372-73 (5th Cir. 1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d at 227 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1376 (8th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1992 WL 296716, at *1 (11th Cir., Oct. 20, 1992); *Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 866, 888-890 (D.C.Cir. 1992). The Ninth Circuit disagreed, holding that "the language of the Act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage." *Davis v. City and County of San Francisco*, No. 91-15113, 1992 WL 251513 (9th Cir. Oct. 6, 1992). There is thus a conflict in the Circuits requiring resolution by this Court.

The conflict regarding whether the language of the 1991 Civil Rights Act by its terms applies to pre-Act cases

turns on basic rules of statutory interpretation generally applicable to all types of legislation. The issue thus has implications far beyond civil rights litigation, and sweeps more broadly even than the question of statutory retroactivity. The Circuits disagree over the continued viability of fundamental rules and methods of statutory construction.

A. There is a Circuit Conflict Over the Basic Rules for Construing Statutory Language

In determining whether the Civil Rights Act of 1991 applies to pre-Act claims, the Circuits arrived at diametrically opposing conclusions from the same statutory terms. The Ninth Circuit in *Davis* found dispositive the language of §§ 402(a), 402(b) and 109(c). Section 402(a), entitled "Effective Date -- In General", provides:

> Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

The *Davis* court examined the two statutory subsections that expressly do "otherwise specifically provide[]..." and confirmed by negative inference that § 402(a)'s mandate that the Act "take effect upon enactment" includes application to pending, pre-Act claims. One of the exceptions to the general applicability rule in § 402(a) is found in § 402(b), entitled "Effective Date -- Certain Disparate Impact Cases." Section 402(b) states:

> Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Section 402(b) ensures that the Act shall not apply retrospectively to the *Wards Cove* case. The other exception to § 402(a) is § 109(c), entitled "Protection of Extraterritorial Employment -- Application of Amendments." Section 109(c) provides that:

> The amendments made by this section [§ 109] shall not apply with respect to conduct occurring before the date of the enactment of this Act.

Section 109(c) provides that the amendments giving the Act extraterritorial reach do not apply to pre-Act conduct.[4]

The Ninth Circuit in *Davis* found that the text of the 1991 Act is clear. The "directives from Congress that in two specific instances [§§ 402(b) and 109(c)] the Act not be applied to cases having to do with pre-Act conduct provide strong evidence of Congress' intent that the courts treat other provisions of the Act as relevant to such cases." *Davis*, 1992 WL 251513, at * 14. The court in *Davis* concluded that "[t]here would have been no need for Congress to provide that the Act does not pertain to the pre-passage activities of the Wards Cove company, see Section 402(b), or of American businesses operating overseas, see Section 109(c), if it had not viewed the Act as otherwise applying to such conduct." *Id.*

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[4] The Ninth Circuit also considered §§ 2 and 3, which include Congress' finding that *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), "has weakened the scope and effectiveness of federal civil rights protection," and Congress' desire to "codify the concepts of 'business necessity' and 'job related' enunciated in ... Supreme Court decisions prior to *Wards Cove*..." and to "respond to recent decisions of the Supreme Court ...." *Davis* 1992 WL 251513, at *14. According to the Ninth Circuit, these provisions show "Congress' sense that the Supreme Court had constricted the Nation's civil rights laws so as to afford insufficient redress to those who have suffered job discrimination," and therefore support application of the new Act to pending claims. *Id.* at *15.

In thus construing the 1991 Act, *Davis* applied the rule that "a statute should be interpreted so as not to render one part inoperative." *See Davis* 1992 WL 251513, at *14 (*citing South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n. 22 (1986), *quoting Colautti v. Franklin*, 439 U.S. 379, 392 (1979).[5] This well established principle was reaffirmed in *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (holding that "a statute must, if possible, be construed in such a fashion that every word has some operative effect"). The other Circuits, however, including the court below, have declined to apply this rule, thus creating conflicts both among the Circuits and with this Court's clear mandate.

The *Davis* court also relied on the rule of construction that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Davis* at *14. (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The other Circuits disregarded this rule in determining whether the 1991 Act applies to pre-Act claims and, again, are in conflict with the Ninth Circuit and this Court.

In disregarding the rules of statutory construction applied in *Davis*, each of the other Circuits that have considered the issue have not found the statutory language

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[5] For this proposition, the court in *Davis* also cited *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-50 (1985) (*quoting Colautti*); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (*quoting Montclair v. Ramsdell*, 107 (17 OHO) U.S. 147, 152 (1883)); and *Beisler v. Commissioner of Internal Revenue*, 814 F.2d 1304, 1307 (9th Cir. 1987) (*en banc*).

conclusive. Some Circuits have simply disregarded §§ 402(b) and 109(c) without comment about the clear inference those sections create. The Sixth Circuit in *Vogel* did not consider §§ 402(b) and 109(c) in construing the statute, found § 402(a) alone insufficiently clear, and turned directly to the legislative history, which it found to be inconclusive. 959 F.2d at 598. The Seventh Circuit in *Luddington* did likewise. 966 F.2d at 227.

The Eleventh Circuit in *Baynes* did not specifically discuss *any* of the Act's language, but simply remarked that "[t]he Civil Rights Act of 1991 does not say whether it applies retroactively or prospectively." *Baynes*, at *1. *Baynes* thus appears to demand an express general statement using the words "prospective" or "retroactive" — a level of explicitness far beyond what this Court has previously demanded. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 838 (1990), the Supreme Court held that the plain language of the provision of the Federal Courts Improvement Act of 1982 that amended the federal postjudgment interest statute was on its face clearly inapplicable to judgments entered before its effective date. 494 U.S. at 838. The Court relied on (a) a statutory reference to the calculation of interest "from the date of the entry of the judgment....," 494 U.S. at 838, and (b) the reference to "*the* rate" and "*a* rate" of interest, *id.*, which the Court took to mean that a single rate should be applied, and that it should be the rate that was in effect on the date of entry of the judgment. *Id.* The inferences to be drawn from §§ 402(b) and 109(c) are more straightforward than those this Court in *Bonjorno* held were facially clear. In demanding a more express statement, *Baynes* represents a new approach to statutory construction inconsistent with this Court's own precedent.

B. There is a Circuit Conflict Over the Role of Legislative Language and History in Statutory Interpretation

In addition to the conflict among the Circuits about how to read the statute's plain language, the Circuits disagree over the role that legislative history plays in statutory construction. Several of the Circuits that found the text inconclusive did so by drawing on the admittedly unclear legislative history of the 1991 Act in order to inject some ambiguity into the statutory language. The Ninth Circuit in *Davis* followed this Court's recent pronouncement in *Bonjorno* that "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language ordinarily must be regarded as conclusive.'" 494 U.S. at 835 (*quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). This Court just last Term in *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992), reaffirmed that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." The other Circuits, however, failed to apply this principle, thus generating an additional inter-circuit conflict.

The District of Columbia Circuit in *Gersman*, for example, rejected the statutory language argument that was determinative in *Davis* by drawing selectively on remarks in floor debates by legislators opposed to retroactivity, including Senators Dole, Danforth, and Gorton, and Representative Hyde. In light of such legislative history, the court in *Gersman* concluded that the language of the statute on its face was unclear, and "one might view these two subsections

[402(b) and 109(c)] not as redundancies, but rather as insurance policies." *Gersman*, 975 F.2d at 890.[6]

The court below considered § 402(a) in isolation, and held that it "could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of that date of enactment." App. at 12a. In an approach similar to that of the District of Columbia Circuit in *Gersman*, the court then quoted at length from the Eighth Circuit's analysis in *Fray* of the legislative history to conclude that §§ 402(b) and 109(c) do not in fact have any independent significance, but are only "hedged ... bets" by the minority in Congress that opposed retroactivity. App. at 13a (*quoting Fray*, 960 F.2d at 1377).

Other Circuits, too, have responded to contentions that the statute on its face is clear by relying on legislative history to read ambiguity into the statute's terms. *E.g. Johnson v. Uncle Ben's, Inc.*, 965 F.2d at 1363 (holding that the express exceptions to applicability in §§ 402(b) and 109(c) do not clearly imply a general rule of applicability in § 402(a), "given the swirling confusion surrounding the Act's passage"); *Mozee*, 963 F.2d at 933 (holding §§ 402(b) and 109(c) inconclusive because the legislative history makes "fairly clear" that these sections were no more than "clear assurance" or

[6] Ironically, the *Gersman* court emphasized that "we do not inquire what the legislature meant; we ask only what the statute means," *id.* at 891, *quoting* Starr, *Observations about the Use of Legislative History*, 1987 Duke L. J. 371, 378 *quoting* O.W. Holmes, *The Theory of Legal Interpretation* in Collected Legal Papers, 207 (1920), because "it is only the statute itself that is law," *id.* Yet the court nonetheless did dig below the surface of the statutory language and drew on "snippets" of the legislative history to find ambiguities behind the otherwise clear message of §§ 402(b) and 109(c). *Id.* at 890.

"extra assurance" of prospective application in specified circumstances).[7]

In sum, the Circuits have taken conflicting approaches on the basic questions of interpreting statutory text, and of the proper role of legislative history in construing legislative terms. These questions are important, and they continue frequently to vex the lower courts. Seven Circuits have already addressed these issues in the context of the applicability of the 1991 Civil Rights Act, and their conflicting approaches call for resolution by this Court.

II. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER NEW LEGISLATION, SUCH AS § 101 OF THE 1991 CIVIL RIGHTS ACT, SHOULD BE PRESUMED APPLICABLE TO PRE-ACT CLAIMS

A. There are Conflicting Presumptions Under *Bradley v. Richmond School Board* and *Bowen v. Georgetown University Hospital*

The Circuits are in conflict regarding the appropriate presumption to determine the applicability of new legislation to pending claims, and the Circuits identify conflicting decisions of this Court as the root of the confusion. The court below referred to "conflicting rules of construction" announced by this Court in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). App. 11a-12a; *see Vogel*, 959

[7] Although the Seventh Circuit in *Mozee* asserts that the legislative history makes clear that § 402(b) and § 109(c) are only intended to provide extra assurance of the Act's nonretroactivity, the court paradoxically acknowledges that "[a] clear indication of congressional intent cannot be deciphered from the legislative history." 963 F.2d at 934.

F.2d at 597 (referring to Supreme Court doctrine on application of new legislation as "not yet settled"). *Bradley* held that a new statute applies to a pending claim "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. *Bowen*, on the other hand, stated that generally "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at 208. This Court in *Bonjorno*, 494 U.S. at 828, referred to this "apparent tension" in the prior decisions, but did not resolve it because the statute at issue in *Bonjorno* was clear on its face.

Other Courts of Appeals have also expressly referred to a conflict in this Court's cases, and have struggled to apply the decisions in *Bradley* and *Bowen*. The Seventh Circuit in *Mozee* referred to "conflicting Supreme Court precedent," and to "two seemingly contradictory lines of cases." 963 F.2d at 934, 935. *See Luddington*, 966 F.2d at 227 (stating that "the courts do not have a consistent rule for deciding whether a statute shall be given retroactive, or merely prospective, effect when the statute does not say," and agreeing with Justice Scalia's observation in *Bonjorno* that the Supreme Court's rules are "in irreconcilable contradiction"). The Eighth Circuit in *Fray* agreed that the Supreme Court has established "two contradictory rules of construction." 960 F.2d at 1375. The Eleventh Circuit in *Baynes* similarly stated that this Court "has so far declined to resolve the conflict in its own rules on presumptions of statutory retroactivity." 1992 WL 296716 at *1. The Fifth Circuit in *Johnson* lamented being "[f]orced ... to choose a cannon of construction without the guidance of controlling authority...." 965 F.2d at 1473.

In the face of this conflict, some courts have simply made a choice to follow either *Bradley*, or *Bowen*. *See, e.g.*,

Landgraf v. USI Film Products, 968 F.2d 427, 432 (5th Cir. 1992) (holding under *Bradley* that § 102 of the 1991 Act should not apply); *Mozee*, 963 F.2d at 938, 940 (holding under *Bowen* that the 1991 Act should not apply); *Fray*, 960 F.2d at 1375, 1378 (referring to prior Eighth Circuit cases choosing to follow *Bowen* rather than *Bradley*, and holding that the 1991 Act should not apply under either presumption); *Baynes*, 1992 WL 296716 *2 (referring to prior Eleventh Circuit cases choosing to follow *Bradley* rather than *Bowen*, and holding that the 1991 Act should not apply under either presumption). Other courts have made attempts to reconcile *Bradley* and *Bowen* by identifying the distinct circumstances in which each applies. *E.g. Vogel*, 959 F.2d at 598 (holding that *Bradley* applies only when new legislation does not alter substantive rights); *Johnson*, 965 F.2d at 1374 (same); *Gersman*, 975 F.2d at 892-900 (same). *Certiorari* should be granted in this case because the Circuit courts need additional guidance from this Court on which presumption to apply.

The confusion in the law governing application of new legislation is also reflected in the fact that, of the Courts that have declined to apply the 1991 Act to pending claims, several have done so over strong dissents. See, e.g., *Mozee*, 963 F.2d at 940 (Cudahy, J., dissenting); *Fray*, 960 F.2d at 1379 (Heaney, J., dissenting); *Vogel*, 959 F.2d at 601 (Ryan, J., dissenting). Moreover, well over two hundred district courts cases around the country have used various rationale to reach conflicting decisions on the applicability of the same provisions of the Civil Rights Act of 1991 to pending claims. *See generally*, *Fray*, 960 F.2d at 1374, 1383-84 (referring to the confusion in the district courts, and appending a list of cases); *Vogel*, 959 F.2d at 598 (referring to split among the district courts).

The need for further guidance from this Court is also demonstrated by the fact that, in litigation to which it is a party, the United States has not taken a consistent position on whether *Bradley* or *Bowen* governs. In a confused and important area of the law, the lower federal courts might ordinarily look to the Department of Justice for principled guidance. Since this Court decided *Bowen*, however, the United States has varied its position from case to case, enthusiastically advocating application of the *Bradley* rule in some cases, then disavowing it in others. For example, in several recent briefs, the United States has asserted that "*Bradley* correctly states the law,"[8] describing the holding as "important," "well-established,"[9] "fundamental"[10] a "time-honored principle,"[11] "well settled," and the rule which "should control."[12] In these cases, government attorneys repeatedly quote the holding in *Bradley* that

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[8] Reply Brief of the United States to Opposition Briefs, *United States v. Allied Corp.*, Civil No. C-83-5898 FMS (N.D.Cal.) at 18.

The briefs cited herein are on file with this Court as Materials Lodged by Amicus NAACP Legal Defense and Educational Fund, Inc., accompanying the petition for *certiorari* in *Bailes v. United States*, No. 91-1075 *certiorari denied*, __ U.S. __, 118 L.Ed.2d 419 (1992).

[9] Response of the United States to Defendants' Motion to Strike Claims for Damages and Penalties, *United States v. Rent America*, No. 89-6188-PAINE (S.D.Fla.), at 23.

[10] Brief for Respondent, *Ayala-Chavez v. I.N.S.*, No. 91-70262 (9th Cir.), at 19.

[11] United States Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6:91-951-3K (D.S.C.), at 4.

[12] Brief of Plaintiff-Appellant Federal Deposit Insurance Corporation, *Federal Deposit Insurance Corp. v. Wright*, No. 90-2217 (7th Cir.), at 26, 27.

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is legislative history to the contrary.[13]

Elsewhere, however, the United States has denigrated *Bradley* and the similar decision in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), as

> two exceptional Supreme Court decisions that conspicuously depart from the general and longstanding rule against retroactivity .... Nothing in the *Bradley* Court's reasoning compelled the conclusion that its broad language suggests ....
>
> * * *
>
> ["]It is significant that *not a single one* of the earlier cases cited in *Thorpe* and *Bradley* ... even *purports* to be applying a presumption of retroactivity.[14]

When the United States has decided to oppose application of a particular new statute to a pre-Act claim, it has repeatedly urged the lower courts to "choose *[Bowen v.] Georgetown* over *Bradley*," insisting that "*Georgetown* is the better

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[13] *See, e.g.*, United States Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6:91-951-3K (D.S.C.), at 4, *quoting Bradley v. Richmond School Bd.*, 416 U.S. at 711.

[14] Defendant's Memorandum in Opposition to Plaintiff's Motion to File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.) at 14, 16 (emphasis in original) (quoting in part the concurring opinion of Scalia, J., in *Bonjorno*, 110 S.Ct. at 1584)

decision."[15] The inconsistent positions taken by the government from case to case underscore the national importance of the issues presented in this petition, and the need for a resolution of the conflict among the circuits.

B. There is a Conflict Over Whether Retroactivity is Determined by Reviewing the Act as a Whole or by Reviewing the Section at Issue

There is a separate conflict in the Circuits about whether the applicability of the 1991 Act should be analyzed with reference to the Act as a whole, or to the particular section sought to be applied. For example, the Fifth Circuit expressly limited its determinations in *Johnson* and *Landgraf* to the applicability of the particular sections before it; the court below, in contrast, held that the Act as a whole is inapplicable. Compare *Johnson*, 965 F.2d at 1372, 1374, and *Landgraf*, 968 F.2d at 432-33, with *Harvis*, App. 14a. *Johnson* expressly declined to consider "whether the Act's provisions affecting Title VII disparate impact claims are retroactive," because those provisions would have had no effect on Johnson's claims. 965 F.2d at 1372. The court then examined § 101 alone to determine whether it "affects substantive antecedent rights." *Id.* at 1374. *Landgraf* similarly looked separately at each provision at issue in that case to analyze whether its application would create "manifest injustice" under *Bradley*. 968 F.2d at 432-33. The Sixth Circuit in this case, however, held that the "distinction between § 101 [at issue here] and § 108 [at issue in *Vogel*] is immaterial, as both *Fray* and *Vogel* examined the retroactivity of the 1991 CRA *as a whole, not in terms of specific sections*, and both courts concluded that applying the Act retroactively

[15] Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distribution*, Nos. 91-3574, 92-1123 (8th Cir.), at 13, n.6.

would adversely affect substantive rights and liabilities." App. 14a (emphasis added).

The Court of Appeals decisions that analyze the applicability of the 1991 Act as a whole conflict with clear precedent from this Court requiring section-by-section analysis. In *Bradley* itself, this Court examined only § 718 of the Education Amendments of 1972, relating to attorney's fees, to determine whether any "manifest injustice" would be created by applying that particular provision to the pending case. *Bradley*, 416 U.S. at 710-724. The Court in *Bradley* did not consider the potential effects on pending cases of the entire 176 pages of statutory provisions included in the Education Amendments of 1972. See Pub. L. No. 92-318, 1972 U.S.C.C.A.N. (86 Stat.) 278-454. Similarly, this Court in *United States v. Security Industrial Bank* determined the inapplicability to pending claims of only § 522(f)(2) of the Bankruptcy Reform Act of 1978, even while it acknowledged the applicability of the balance of the amendments, on the ground that only § 522(f)(2) would "destroy previously vested property rights." 459 U.S. 70, 79 (1982). *Certiorari* should be granted here to review the decision below which erroneously determined the non-retroactivity of the 1991 Civil Rights Act as a whole.

III. Under This Court's Prior Decisions, The Construction Of 42 U.S.C. § 1981 In *Patterson v. McLean Credit Union* Should Not Be Applied Retroactively After Congress Expressly Rejected It

Certiorari should be granted to determine the proper application of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), to this case. The court below applied the *Patterson* decision retroactively to Rivers's and Davison's § 1981 claims

after *Patterson*'s construction of the statute had been repudiated by Congress. The decision below is thus contrary to this Court's decisions.

The common animating principle behind *Chevron* and the fractured opinions in *James B. Beam* is that a new, judicially announced rule should be promptly and uniformly applied because the new rule is the one which has been determined to be correct, and which will apply in all future cases. Application of a new — and therefore presumably correct — rule to pending cases advances the purposes behind the judicial new rule, and promotes prompt uniformity among judicial decisions. However, these considerations are inapplicable where the new judicial rule has been repudiated by Congress and will *not* be applied in the future. The effect of retroactive application of a judicial construction that Congress has rejected, such as *Patterson*'s interpretation of § 1981, is simply to ensure more inconsistent decisions and to perpetuate bad law.[16]

The propriety of non-retroactive application of new rules of decision has long been governed by the standard set forth in *Chevron*, 404 U.S. 97. This Court last Term in *James B. Beam* limited *Chevron* by holding that when a new rule of constitutional law is applied in the case announcing that rule, the rule must then also be applied retroactively to all other pending claims. *James B. Beam* did not overrule *Chevron*. Because there were five separate opinions in *James B. Beam*, and no plurality opinion, however, the precise scope of the

[16] This reasoning does not depend on a determination that the 1991 Civil Rights Act applies to pending cases. Rather, it rests on a more general notion that, to the extent that *James B. Beam* disfavors application of defunct rules to pending cases and insists on prompt application of new rules, that interest is subverted, not furthered, by anachronistic application of *Patterson*.

decision is unclear, as is the continuing role of *Chevron*. This case offers an ideal opportunity to refine the principles of *James B. Beam* and *Chevron*, and to clarify the circumstances in which each decision applies.

Because the Supreme Court's holding in *Patterson* interpreted 42 U.S.C. § 1981 and not the Constitution, the holding of *James B. Beam* is inapplicable here, and *Chevron* remains the test for determining retroactivity of *Patterson*. Justices Scalia, Blackmun and Marshall concurred in the judgment in *James B. Beam* in support of the retroactivity of a constitutional decision to the claim before them, but they did not support the broader reasoning of Justice Souter's opinion, nor reject the earlier holding of the *Chevron* case.[17] Only Justices Souter, Stevens, and White adhered to a general principle of retroactivity not limited to constitutional decisions.[18]

Even if *James B. Beam* applied to decisions regarding statutory as well as constitutional law, it should not apply to this case because *James B. Beam* did not involve the retroactive application of a rule of decision which has been subsequently repudiated by Congress. The test announced in *Chevron* thus applies here. The Court below, however, applied *Chevron* improperly because it failed to consider the impact of the 1991 Act on the retroactivity analysis.

[17] 111 S. Ct. at 2449 (opinion by Blackmun, J., joined by Marshall and Scalia, JJ., concurring in the judgment) (stating agreement only "that failure to apply a newly declared *constitutional* rule to cases pending on direct review violates basic norms of *constitutional* adjudication.") (emphasis added).

[18] 111 S. Ct. at 2442 (opinion by Souter, J., joined by Stevens, J.); *id.* at 2448 (opinion by White, J., concurring in the judgment).

The three *Chevron* factors strongly counsel against application of *Patterson* after Congress has rejected it. First, Congress' numerous references in enacting the 1991 Act to its desire to restore § 1981 to its pre-*Patterson* construction make clear that the decision "establish[ed] a new principle of law..." at variance with the prior construction of § 1981. *Chevron*, 404 U.S. at 106.[19] Second, the "purpose and effect" of *Patterson's* reading of § 1981, and the interest in "further[ing] ... its operation," *id.* at 106-107, do not support *Patterson's* retroactivity because there is no valid interest in perpetuating the operation of an obsolete rule by continuing to apply it retroactively after it has been expressly repudiated. Third, "the inequity imposed by retroactive application" and the mandate of *Chevron* to avoid "injustice or hardship," *id.* at

[19] Congress passed the 1991 Act "to respond to recent decisions of the Supreme Court...." § 3(4). The legislative history corroborates the plain language of the statute on § 101's restorative function. There was no disagreement by any member of Congress that legislation overturning *Patterson* would restore what until 1989 had been the established reading of § 1981. *See, e.g.* 137 Cong. Rec. S 15235 (daily ed. Oct. 25, 1991) (Sen. Kennedy) (section 101 "will reverse ... Patterson... and restore the right of Black Americans to be free from racial discrimination in the performance — as well as the making — of job contracts"); 137 Cong. Rec. S 15489 (daily ed. Oct. 25, 1991) (Sen. Leahy) ("The *Patterson* decision drastically limited section 1981's application.... The Civil Rights Act of 1991 returns the originally intended broad scope of this statute"); 137 Cong. Rec. H 9526 (daily ed. Nov. 7, 1991); (Rep. Edwards) (section 101 "reinstates" and "restores" law prior to *Patterson*); 137 Cong. Rec. H3900 (daily ed. June 4, 1991) (Rep. Goodling) ("[H.R.1] reverses ... the *Patterson* case.... [T]he substitute restores the expansive reading of Section 1981 that racial discrimination is prohibited in all aspects of the making and enforcement of contracts"); 137 Cong. Rec. H. 3935 (daily ed. June 5, 1991) (Rep. Goodling) (describing Administration proposal as "same provision" as the § 101 precursor in H.R. 1); 136 Cong. Rec. S 9851 (daily ed. July 17, 1990) (Sen. Kassebaum) (§ 101 codifies "the law as it was prior to *Patterson*"); 137 Cong. Rec. S 15285 (daily ed. Oct. 28, 1991) (Sen. Seymour) (Act "restores section 1981").

107, requires that *Patterson* not be applied. Accrued claims of racially discriminatory firing that were filed prior to the Supreme Court's decision in *Patterson* and that were ultimately decided after Congress rejected *Patterson* should not be eliminated simply because they were pending during the brief life of *Patterson*. Similar claims survived simply because they were decided earlier or arose later. *Certiorari* should be granted to review the decision of the court below because it applied *Patterson* retroactively without properly analyzing the impact of the 1991 Act on application of *Chevron* to this case.

CONCLUSION

For the reasons stated above, a writ of *certiorari* should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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December 2, 1992

APPENDIX

Recommended For Full-Text Publication
Pursuant to Sixth Circuit Rule 24

No. 91-3348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR.,	:	
	:	
Plaintiff,	:	
	:	
MAURICE RIVERS and ROBERT C. DAVISON,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	On Appeal from the United States District Court for the Northern District of Ohio
	:	
ROADWAY EXPRESS, INC.	:	
	:	
Defendant-Appellee.	:	

Decided and Filed August 24, 1992

Before: GUY, BOGGS, and SILER, Circuit Judges.

BOGGS, Circuit Judge, delivered the opinion of the court, in which GUY, Circuit Judge, joined. SILER, Circuit Judge (pp. 14-16) [14a-16a], delivered a separate opinion concurring in part and dissenting in part.

BOGGS, Circuit Judge. In this race discrimination case, the appellants originally claimed they were discharged because of racial discrimination and now state that the claim was also for retaliatory discharge for winning a grievance, exercised for racial reasons. The claim was dismissed by the district court based upon the United States Supreme Court ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). On appeal, appellants argue that the district court misapplied *Patterson*, but that even if their claim had been properly dismissed, this court should reinstate their claim by retroactively applying to this case the new Civil Rights Act of 1991 (CRA of 1991), Pub. L. No. 102-166, 105 Stat. 1071-1100, 42 U.S.C. § 1981, which explicitly enacted the interpretation of § 1981 rejected in *Patterson*. We reverse on the grounds that the district court misapplied *Patterson* to dismiss appellants' retaliatory discharge claim. We affirm the district court's dismissal of the race discrimination in firing claim, and hold that the CRA of 1991 should be not applied retroactively to this case.

I

Plaintiffs-appellants Maurice Rivers and Robert C. Davison are Black garage mechanics who were employed by defendant Roadway Express, Inc. since 1972 and 1973 respectively. On the morning of August 22, 1986, Roadway verbally informed Rivers and Davison that they were required to attended disciplinary hearings that same day related to their accumulated work record. Both plaintiffs refused to attend, alleging inadequate notice. Roadway was contractually required to provide prior written notice of such hearings and allegedly routinely did so for white employees. The hearings resulted in two-day suspensions for both appellants. Appellants filed grievances with the Toledo Local Joint Grievance Committee (TLJGC), which granted the grievances based on "improprieties" and awarded each appellant two days of back pay.

Shortly after these initial hearings, disciplinary hearings were again called by Roadway's Labor Relations Manager, James O'Neil, who announced that he would hold disciplinary hearings against Rivers and Davison within seventy-two hours. Rivers and Davison again refused to attend, claiming inadequate notice. As the result of the hearings, both Rivers and Davison were discharged on September 26, 1986, for refusing several direct orders to attend the hearings and for the accumulated work record.

In February 1987, Rivers and Davison, along with James T. Harvis, filed this suit, alleging that Roadway discriminated against them on the basis of race, in violation of 42 U.S.C. § 2000e. They also alleged that Roadway violated the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185(a), and brought an unfair representation claim against their union. Both of these latter claims were dismissed on summary judgment by the district court.

The district court then separated Harvis's case, which went to trial and ended in a jury verdict on the § 1981 claim for Roadway. The district court ordered judgment against Harvis on his § 1981 and Title VII claims. Harvis's appeal to this court was denied and the trial court's judgment affirmed. *Harvis v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991).

On June 15, 1989, shortly after Harvis's verdict and before appellants went to trial, the Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), which held that the right to make contracts protected by § 1981 does not apply to conditions of employment, but only covers discrimination in the formation of the employment contract or the right to enforce the contract. The district court, while holding that *Patterson* was not retroactive with respect to Harvis's jury verdict, held it did have retroactive effect on the untried and pending

§ 1981 claims of Rivers and Davison. The district court concluded that appellants' claims were for discriminatory discharge and thus, based on *Patterson*, could not be maintained under § 1981. Rivers and Davison argued that their claims were not simply for discriminatory discharge, but rather for retaliation for their success in enforcing contract rights in a grievance hearing. However, the district court held that these were only basic breach of contract claims, and not claims based on the right to enforce contracts, which would fall under § 1981. After dismissing the § 1981 claims, the district court held a bench trial on plaintiffs' Title VII claims and ruled in favor of Roadway, holding that Rivers and Davison failed to establish that their discharge from employment was based upon their race.

Rivers and Davison appeal the district court's dismissal of their § 1981 claims on two grounds. First, they argue that *Patterson* does not preclude this action, as it is not an action for discriminatory discharge, but rather an action based on retaliation for attempting to enforce the labor agreement, thus squarely falling under § 1981. Second, while this appeal was pending, the CRA of 1991 was enacted, explicitly contradicting the *Patterson* decision. Appellants argue that the CRA of 1991 should be applied retroactively to their § 1981 claims, thus invalidating the district court's decision. The case, they argue, should be remanded for a new determination under this new legislation.

II

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of

> persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The *Patterson* court limited the scope of § 1981 actions by holding that § 1981 does not apply to discrimination in conditions of employment, but only prohibits discrimination in the formation of the employment contract or the right to enforce the contract. *Patterson*, 491 U.S. at 176. Thus, under *Patterson*, § 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 179.

While *Patterson* did not directly address the issue of whether § 1981 applied to discriminatory discharges, this court, along with a majority of other courts, has held that claims of discriminatory discharge are no longer cognizable under § 1981 because discharge does not involve contract formation. *See Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991); *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir. 1991), *cert. denied*, 111 S. Ct. 2917 (1991). The plaintiffs, below and on appeal, argue that theirs were not discriminatory discharge claims, but rather, claims of retaliatory discharge where plaintiffs were punished for attempting to enforce their contract rights to be treated equally with white people. The district court rejected this claim as "bootstrapping" and held that this was solely a discriminatory discharge case.

Before deciding whether or not *Patterson* was correctly applied, we must first address whether the district court was correct in retroactively applying *Patterson* to the claims of Rivers and Davison. Our circuit has twice held that *Patterson* does apply retroactively to pending cases. In *Prather v. Dayton Power & Light Co.*, *supra*, we applied

Patterson retroactively to a pending discriminatory discharge case based on three factors used to determine whether an exception mandating nonretroactivity exists, as discussed by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Under these factors, a decision will not be applied retroactively if, first, it

> establishes a new principle of law, either by overruling clear past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Id. at 106 (citations omitted). The second retroactivity factor is the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 106-07. Finally, the third factor involves weighing "the inequity imposed by retroactive application" to avoid "injustice or hardship." *Id.* at 107.

Weighing these factors, the *Prather* court held that applying *Patterson* retroactively would not "retard its operation," nor would it produce "substantial inequitable results" that might otherwise be avoided and concluded that applying *Patterson* would not unduly prejudice the plaintiff. *Prather*, 918 F.2d at 1258. This decision was reaffirmed in *Hull v. Cuyahoga Valley Bd. of Educ.*, *supra*. The district court correctly found that *Patterson* applied retroactively to the pending § 1981 claims of Rivers and Davison.

III

Appellants argue that, even if *Patterson* is applied retroactively to their case, their claims still survive *Patterson* and the district court wrongly dismissed the claim as a discriminatory discharge complaint not recognized under § 1981. We agree.

Appellants contend that *Patterson* only eliminates those claims of retaliation for exercising rights that are unrelated to the specific § 1981 right to "make and enforce contracts." But, they argue, *Patterson* does not eliminate a cause of action for exercising rights that do relate to the enforcement of contract rights. Appellants maintain that they are not making discriminatory discharge claims, but rather are claiming retaliatory discharge that punished them for enforcing their contract right to receive notice equal to that received by whites.

Roadway counters that Rivers and Davison were not punished for enforcing their contract rights as

> The right to enforce contracts does not however extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Patterson, 491 U.S. at 177-78.

However, the prohibited conduct of impairing the ability to enforce contract rights is exactly what appellants are complaining about here. Rivers and Davison were punished, they contend, for trying to utilize the established legal process for their grievances. The fact that Roadway allowed formal "access" to legal process does not imply that it could never be impairing the employee's "ability to enforce through legal process." An employer's intimidation and punishment conducted inside formal legal process may impair an employee's contract rights just as much as intimidation and punishment conducted outside formal legal process. *See Carter v. South Central Bell*, 912 F.2d 832, 840 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991) (court emphasized that the alleged conduct must have impaired the plaintiff's ability to enforce contractual rights either through court or otherwise on the basis of race).

Appellants' claims are similar to those in *Von Zuckerstein v. Argonne National Lab.*, 760 F. Supp. 1310, 1318 (N.D. Ill. 1991), where plaintiffs were permitted to proceed to trial on their § 1981 claims that "defendants specifically retaliated against them for pursuing (or intending to pursue) their *contract claims* in the internal grievance forum." *Id.* at 1318 (emphasis in original). We do not agree with appellee's argument that *Von Zuckerstein* is distinguishable because it involved an employer who impaired or impeded the plaintiffs from using the available legal process to enforce a specific anti-discrimination contract right. However, § 1981 speaks of the right to "enforce contracts," which includes any contract rights, not just anti-discrimination contract rights. The key here is that plaintiffs were impaired from enforcing contract rights, not the kind of contract right they were impaired from enforcing. Just because Rivers and Davison were allowed to use the available legal process does not mean the employer did not discriminate against them through retaliation for the very act of using that legal process. Retaliation is defined more broadly than mere access to legal process. *McKnight v. General Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 199), *cert. denied*, 111 S. Ct. 1306 (1991), held that retaliation "is a common method of deterrence." We hold that appellants have articulated this essential element of § 1981, that their ability to enforce claimed contract rights was impaired because of their race.

Roadway argues that even if retaliatory discharge did occur, the plaintiffs never alleged retaliatory discharge in either their first or amended complaints. However, upon examination of the record, we find that sufficient allegations exist to form the basis of a retaliatory discharge claim. While appellants admit that their pre-*Patterson* complaint was not specifically structured as a "right to enforce a contract" claim as opposed to a "condition of employment" claim, the very basis of their complaint has always stemmed from retaliatory discharge. They allege, in their amended

complaint, that "Rivers' [sic] and Davison's discharges were taken without just cause. More particularly Roadway scheduled a hearing for them for September 26, 1986, based on conduct for which a grievance committee had previously exonerated them with backpay." We find that the appellants' claims fall within the *Patterson* definition of permissible § 1981 actions, as the claims involve discrimination in the right to enforce a contract. We hold that the district court wrongly dismissed appellants' § 1981 claims and the case should be remanded for further proceedings on the § 1981 claims.

Our holding that the case should be remanded for further proceedings on appellants' § 1981 claims raises potential collateral-estoppel problems. The district court has already had a bench trial on the appellants' Title VII claims, finding that Rivers and Davison were not discharged from employment based on their race.

A similar situation existed in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), where Lytle, a Black machinist for a subsidiary of Household Manufacturing, was dismissed for unexcused absences. Lytle filed a complaint with the EEOC, alleging that he had been treated differently than white employees who missed work. He then brought discriminatory discharge and retaliation claims under § 1981 and Title VII. The district court dismissed Lytle's § 1981 claims, concluding that Title VII provided the exclusive remedy for his racial discharge and retaliation claims. At a bench trial on the Title VII claims, the district court dismissed Lytle's discriminatory discharge claims pursuant to Rule 41(b), Fed. R. Civ. P., and granted defendants summary judgment on the retaliation claim.

The Fourth Circuit affirmed, ruling that the district court's findings with respect to Title VII claims collaterally estopped Lytle from litigating his § 1981 claims because the elements of a cause of action under § 1981 are identical to

those under Title VII. *Lytle*, 494 U.S. at 549; *see also Washington v. Brown & Williamson Tobacco Corp.*, 756 F. Supp. 1547, 1555 (M.D. Ga. 1991). The Supreme Court reversed, based on plaintiff's seventh amendment right to trial by jury in "suits at common law," noting that:

> When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact."

Lytle, 494 U.S. at 550 (citations omitted).

The Supreme Court distinguished the *Lytle* situation, where the equitable and legal claims were brought together, from the situation in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), where the Supreme Court held that "an equitable determination can have collateral-estoppel effect in *subsequent* legal action and that this estoppel does not violate the Seventh Amendment." *Lytle*, 494 U.S. at 550-51 (citing *Parklane Hosiery Co.*, 439 U.S. at 335) (emphasis added).

We find that our situation falls squarely under the *Lytle* precedent and hold that collateral estoppel does not preclude relitigation of issues decided by the district court in its bench trial resolution of the equitable claims of Rivers and Davison under Title VII. As in *Lytle*, the purposes served by collateral estoppel do not justify applying the doctrine in this case. *Id.* at 553. Collateral estoppel is designed to protect parties from multiple lawsuits and potentially inconsistent decisions, as well as to conserve judicial resources. *Ibid.* Although remanding for further proceedings certainly will expend greater judicial resources, such litigation is essential in preserving Rivers's and Davison's seventh amendment rights to a jury trial.

V

While this case was pending on appeal, the United States Congress passed the Civil Rights Act of 1991. Appellants now argue that the district court should also be reversed in light of the 1991 Act, which amends § 1981 to change the result in *Patterson*. The 1991 Act states that:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Pub. L. 102-166, § 101(b); 42 U.S.C. § 1981(b).

Both this Circuit and the Eighth Circuit have addressed whether this act should apply retroactively to § 1981 claims that were pending on appeal at the time of enactment. Both circuits have ruled that the CRA of 1991 does not apply retroactively. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992).

Both *Vogel* and *Fray* examine the history of judicial treatment of retroactivity as applied to new legislation. Building upon both Roman civil law and English common law, up to 1969 it was a well-established principle in American jurisprudence that legislation must be applied only prospectively unless the legislature specifically decreed a retroactive application. *Fray*, 960 F.2d at 1374. However, in *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969), and in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), the Supreme Court held that a new statute must be retroactively applied to a case that was pending on appeal at enactment "unless doing so would result in manifest injustice

or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711.

Later, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court reiterated the principle that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires the result." *Id.* at 208. While the Supreme Court acknowledged this tension in the case law in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), the court did not have to resolve the issue, as congressional intent was found to be clear in that case.

Given these conflicting rules of construction, both the *Vogel* and *Fray* courts examined the language and legislative history of the CRA of 1991 and concluded that it should not be applied retroactively. For example, § 402 of Pub. L. 102-166 states that "[e]xcept as otherwise provided, this Act and the Amendments made by this Act shall take effect upon enactment." While appellants argue that this indicates retroactivity, the *Vogel* court correctly noted that this language could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of that date of enactment. *Vogel*, 959 F.2d at 597-98.

Both the *Vogel* and *Fray* courts also agree that the legislative history sheds little light on the matter, as Senators expressed conflicting views and no legislative committee reports exist explaining the bill. *Fray*, 960 F.2d at 1376-77. Appellants argue that retroactivity is implied because two sections are expressly made prospective. However, the *Fray* court notes that a bill that specifically changes the result in *Patterson* retroactively was vetoed by the President in 1990 and Congress failed to override the veto. The court concluded that:

> We think a rather clear picture emerges from this review of the Act and its legislative history. Proponents of retroactively overruling *Patterson* commanded a majority in both houses of Congress, but they could not override the President's veto of a 1990 bill that contained express retroactive provisions. Thus, proponents could do no better than send an ambiguous law to the judiciary. On the other hand, opponents of retroactivity who favored enactment of a prospective law (including the President) were also willing to hand this controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue. However, when a congressional majority could be marshalled, retroactivity opponents "hedged their bets" by expressly making specific provisions, such as § 109, prospective only.

Fray, 960 F.2d at 1377.

Given the ambiguous legislative history and language of the act, this court held in *Vogel* that

> *Bradley* should be read narrowly and should not be applied in contexts where "substantive rights and liabilities", broadly construed, would be affected. Clearly, retroactive application of the 1991 Act would affect "substantive rights and liabilities" of the parties to this action.

Vogel, 959 F.2d at 598, citing *United States v. Murphy*, 937 F.2d 1032, 1037-38 (6th Cir. 1991).

Appellants argue that *Vogel* is not determinative here since it deals with § 108, which is written differently from

§ 101, the section at issue here. They also argue that the *Fray* opinion, which does deal specifically with § 101, is wrong. However, appellants' arguments are not well taken on either count. Their distinction between § 101 and § 108 is immaterial, as both *Fray* and *Vogel* examined the retroactivity of the 1991 CRA as a whole, not in terms of specific sections, and both courts concluded that applying the Act retroactively would adversely affect substantive rights and liabilities.

We agree with the *Fray* and *Vogel* decisions and hold that the 1991 CRA does not apply retroactively. However, as we also find that the district court misapplied *Patterson*, the case can be reversed on those substantive grounds alone. We REVERSE and REMAND for further proceedings under § 1981, as we hold that *Patterson* does not exclude § 1981 claims based on retaliation for attempting to enforce contract rights.

SILER, Circuit Judge, concurring in part and dissenting in part. I concur with the majority opinion in full, except that which is listed in part III. It is my opinion that *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), does not permit a claim for retaliation pursuant to 42 U.S.C. § 1981 under the facts of this case. It may be that *Patterson* precludes any retaliatory claims under § 1981, but this court need not go that far.

First, I have much more of a problem than the majority in determining whether the plaintiffs ever alleged retaliatory discharge in either their first or amended complaints. However, for purposes of this analysis, I will assume that they did.

The majority relies upon the decisions in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Circ. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); and *Von Zuckerstein v. Argonne Nat'l Lab.*, 760 F. Supp. 1310 (N.D. Ill. 1991).

However, *McKnight* did not hold that § 1981 allows a claim for retaliation. Instead, it *assumed* that it was so actionable "provided that the retaliation had a racial motivation." *McKnight*, 908 F.2d at 111. Then, the court went on to find that the plaintiff in that case "*might* be guilty of violating section 1981." *Id.* at 112 (emphasis added). It further stated that the question need not be pursued, "because General Motors did not interfere with *contractual* entitlements." *Id.*

Moreover, the court in *Von Zuckerstein* held at 1319 that the plaintiffs in that case would have to establish "that they sought to use the internal grievance procedure to vindicate their contractual right to be free from discrimination." That is unlike the present case, which apparently does not have an antidiscrimination provision in the collective bargaining agreement.

Instead, I would follow the decision in *Carter v. South Cent. Bell*, 912 F.2d 832, 840 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991), which held that § 1981 no longer extends to retaliatory termination. Although that case is somewhat different from this one, in that the plaintiff asserted that he was retaliated against because of filing a charge with EEOC, which was a statutory right, not a contractual right, nevertheless, the court stated:

> Were we to hold that section 1981 still encompasses retaliatory discharge, we would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or "merely" to discriminate? This would be pointless. Both motives are equally invidious, and the employee suffers the same harm. Because section 1981 no longer covers retaliatory termination, all suits for discriminatory dismissal must be brought under Title VII.

Id. at 840-841. *Accord Overby v. Chevron USA, Inc.*, 884 F.2d 470, 472-473 (9th Cir. 1989), cited with approval in *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ.*, 926 F.2d 505, 509 (6th Cir.), *cert. denied*, 111 S. Ct. 2917 (1991), for the proposition that retaliatory discharge claim is conduct not cognizable under § 1981.

Moreover, this court has, by unpublished decisions, followed that rule from *Carter*. Although they have no precedential value, see Sixth Cir. R. 24(c), they were cited by Roadway Express in its brief. I am not inclined to completely ignore opinions of other judges on this court, even if they are not binding. In *Christian v. Beacon Journal Publishing Co.*, No. 89-3822, 1990 U.S. App. LEXIS 12080 (6th Cir. July 17, 1990) (unreported), the court held that claims of retaliatory discharge may not be brought pursuant to § 1981 under *Patterson*, citing *Singleton v. Kellogg Co.*, No. 89-1073, 1989 U.S. App. LEXIS 17920 (6th Cir. Nov. 29, 1989) (per curiam) (unreported). *See also Bohanan v. United Parcel Serv.*, No. 90-3155, 1990 U.S. App. LEXIS 20154 (6th Cir. Nov. 14, 1990) (unreported) (Wellford, J., concurring). Therefore, I would affirm the district court in all respects.

[Dated Oct. 13 1992]

No. 91-3348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR.,	)	
	)	
Plaintiff,	)	
	)	
MAURICE RIVERS;	)	
ROBERT C. DAVISON,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	**ORDER**
	)	
ROADWAY EXPRESS, INC.,	)	
	)	
Defendant-Appellee.	)	

BEFORE: GUY, BOGGS, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied. Judge Siler would grant rehearing for the reasons states in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

[Dated Jan. 19, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

James T. Harvis, Jr., et al.,

Plaintiffs

Case No. C 86-7955

vs.

Roadway Express, Inc., et al.,

Defendants

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on plaintiffs' response to the Court's show cause order of July 10, 1989, defendants' reply, and plaintiffs' surreply. This Court's order of July 10, 1989 ordered plaintiffs to show cause why their claims brought pursuant to 42 U.S.C. §1981 should not be dismissed pursuant to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

The current posture of the case is such that a jury returned a verdict finding no violation of §1981 against plaintiff James Harvis. Two days later, on June 15, 1989, the Supreme Court decided *Patterson*. Defendants contend that the *Patterson* decision should not apply retroactively to Harvis' §1981 claim. Plaintiff, however, argues precisely the opposite. The *Patterson* decision should, according to plaintiffs, be applied retroactively to Harvis' claim, thus depriving the Court of subject matter jurisdiction on Harvis'

§1981 claim. Plaintiffs contend that the Court must as a result disregard the jury verdict rendered on Harvis' §1981 claim and make its own findings of fact and conclusions of law with regard to Harvis' 42 U.S.C. §2000e et seq. claim. Thus, the first issue before the Court is what effect the *Patterson* decision must be given regarding Harvis' §1981 claim.

The parties have correctly pointed out that judicial decisions involving statutory interpretation are generally applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). However, under certain circumstances it is appropriate not to apply a decision retroactively. The *Chevron* court set forth a three-part analysis to be used in determining the nonretroactivity question. The court stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principal of law, either by overruling clear past precedent on which litigants have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking at the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [Citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citation omitted.]

Id. at 106-107.

This Court has applied *Patterson* retroactively to cases pending before it. See, e.g., *Haynes v. The Salvation Army*, No. 3:89CV7115 (N.D. Ohio Aug. 22, 1989) and *Hernandez v. AP Parts Co.*, No. C88-7797 (N.D. Ohio Aug. 22, 1989). However, those cases did not involve the factual scenario of the case sub judice since no jury verdict had been returned yet on the §1981 claims. Thus, the relevant question is whether the fact that a jury rendered a verdict on Harvis' §1981 claim should preclude a retroactive application of *Patterson*. At least one other district court considered this issue in light of the *Chevron* nonretroactivity analysis and concluded that equity disfavors the retroactive application of Patterson to a §1981 claim tried to a verdict before a jury. *Gillespie v. First Interstate Bank of Wisconsin Southeast*, 1989 U.S. Dist. LEXIS 8150 (E.D. Wisc. 1989). The Court agrees that to apply *Patterson* to §1981 claims tried to a verdict before a jury would yield an inequitable result to the prevailing party, whether it be plaintiff or defendant. Accordingly, *Patterson* does not apply to Harvis' §1981 claim and the jury verdict on the claim survives *Patterson*.

When a party has a right to a jury trial on an issue involved in a legal claim, the court is bound by the jury's determination of that issue as it relates to an accompanying equitable claim. *In re Lewis*, 845 F.2d 624, 629 (1988). Clearly, both 42 U.S.C. 2000e et seq. (Title VII) and 42 U.S.C. §1981 require proof of purposeful discrimination on the part of a plaintiff in order to prevail. *Daniels v. Board of Educ. of Ravenna City School District*, 805 F.2d 203, 207 (1986). In the case of Harvis, a jury found that intentional discrimination based on race was not a factor in his discharge. Pursuant to *Lewis*, this Court is bound to follow

that determination with respect to Harvis' Title VII claim and enter judgment in favor of defendant. The Court is persuaded that final judgment should be entered on Harvis' claim pursuant to Rule 54(b). Harvis' claims are dissimilar to those of Rivers and Davison and thus there is no just reason for delay in entering judgment on Harvis' claims.

The second issue before the Court is whether the §1981 claims of plaintiffs should be dismissed pursuant to *Patterson*. It should be noted that the Court concludes, pursuant to the Chevron analysis, that *Patterson* should be applied retroactively to the §1981 claims of Rivers and Davison since they have not yet been tried to a jury.

Defendants [sic: Plaintiffs] Rivers and Davison have pled in essence that their discharges were racially motivated and thus violated §1981. However, in Patterson the court held as follows:

> By its plain terms, the relevant provision in §1981 protects two rights: "the same right . . . to make . . . contracts" and "the same right . . . to . . . enforce contracts." The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a

> contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII. See *infra*, at __.

Patterson, 109 S. Ct. at 2372-73. Since the *Patterson* decision, this Court and others[1] have concluded that §1981 does not apply to discriminatory discharges since a discharge is conduct which occurs after the formation of a contract.

Finally, although plaintiffs Rivers and Davison contend that they were discharged in retaliation for exercising their grievance procedure rights, the Court is not persuaded that the complaint continues to state a claim upon which relief can be granted in light of *Patterson*. Other district courts have considered similar issues and concluded that claims that a plaintiff was discharged in retaliation for exercising rights still protected under §1981 do not state a claim under §1981 in light of *Patterson*. *Dangerfield, et al. v. The Mission Press*, 1989 U.S. Dist. LEXIS 8985 (N.D. Ill. 1989) (holding that a retaliatory discharge for filing EEOC complaint was no longer actionable under §1981); *Hall*, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989) (holding that discharge for complaints about discrimination not actionable). In this case plaintiffs Rivers and Davison contend that they were discharged in retaliation for prevailing in a grievance hearing. However, such a "bootstrapping" of the actual breach of contract claim into a claim that plaintiffs were deprived of the right to enforce the contract was rejected in *Patterson*. *Id.* at 2376. Plaintiffs concede that "the claim of denial of access to those

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[1] See *Williams v. National Railroad Passenger Corp.* 1989 U.S. Dist. LEXIS 8859 (D. D.C. 1989); *Hall v. County of Cook*, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989); *Haynes, supra*; *Hernandez, supra*.

[grievance and judicial] forums is not the claim here." Plaintiffs' Reply at 6. Ironically, the denial of access to such forums is precisely what is protected under the "right to . . . enforce contracts" provision of §1981. Plaintiffs Rivers and Davison have been free to grieve or litigate their discharges in the appropriate forums. Thus, their complaint fails to allege that they have been deprived of their §1981 rights. Accordingly, the §1981 claims of Rivers and Davison will be dismissed.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that judgment be, and hereby is, entered in favor of defendant on plaintiff Harvis' 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981 claims; and it is

FURTHER ORDERED that the 42 U.S.C. §1981 claims of plaintiffs Rivers and Davison be, and hereby are DISMISSED.

/s/ John W. Potter
United States District Judge

Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

(2)

No. 92-938

IN THE

Supreme Court of the United States

October Term, 1992

MAURICE RIVERS
and
ROBERT C. DAVISON,
Petitioners,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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43pp

QUESTIONS PRESENTED

1. Does the legislative expansion of 42 U.S.C. §1981 contained in the Civil Rights Act of 1991, enacted and effective on November 21, 1991, apply retroactively to pending cases?

2. Should the Court reverse its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) to apply its interpretation of 42 U.S.C. §1981 to pending cases?

LIST OF PARTIES

Respondent, Roadway Express, Inc. ("Roadway") is a wholly-owned subsidiary of Roadway Services, Inc. There is no additional parent or subsidiary company to be listed pursuant to Rule 29.1.

Petitioners' list of parties (Petition at ii) contains minor misstatements. The claims of James T. Harvis, Jr., a co-plaintiff with petitioners Maurice Rivers and Robert C. Davison ("Rivers" and "Davison" respectively when referred to individually, and "Petitioners" when Rivers and Davison are referred to jointly), were not severed by the district court from those of Rivers and Davison, but separate trials were conducted. (3/14/89 Memorandum and Order of the District Court.) The district court's November 30, 1988 grant of summary judgment to Roadway and defendant Local 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union") dismissed Petitioners' and Harvis' hybrid §301 (29 U.S.C. §185(a)) claims. (11/30/88 Memorandum and Order at 2-3.) Other claims asserted by Petitioners and Harvis against the Union were earlier dismissed or withdrawn. (12/1/87 Pretrial Order; 6/6/88 Report and Recommendation; 9/1/88 Order.) Those other claims were also abandoned on appeal. Petitioners list of parties is otherwise correct.

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No. 92-938

IN THE

Supreme Court of the United States

October Term, 1992

MAURICE RIVERS
and
ROBERT C. DAVISON,
Petitioners,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Roadway supplements the opinions submitted by Petitioners with (1) the October 18, 1990 Findings of Fact and Conclusions of Law of United States District Judge John W. Potter of the Northern District of Ohio, Western Division, rendered after a full trial on the merits of Petitioners' claims of discrimination, and (2) the opinion of the Sixth Circuit reported as *Harvis v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991), the previous Sixth Circuit decision rendered on Harvis' appeal.

The order of the district court is significant because it summarizes the evidence adduced at Petitioners' one week trial in the district court on their claims of race discrimination; Petitioners omit mention of their trial.

The Sixth Circuit's previous opinion is significant because the Court can see that the applicability of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) was conceded; Petitioners' second "Question Presented" was waived below.

The district court opinion is set out at A1-A13 of the included Appendix ("App.") and the Sixth Circuit opinion is set out at App. A14-A19.

JURISDICTIONAL STATEMENT

Petitioners pray for exercise of court's jurisdiction pursuant to 28 U.S.C. §1254(1) which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit has determined that Petitioners' claims are actionable under 42 U.S.C. §1981 ("§1981") as it existed *before* the Civil Rights Act of 1991 ("the 1991 Act"). *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 494-495 (6th Cir. 1992).[1] Therefore, the retroactive application of the 1991 Act is no longer a material issue in this case.

[1] The two opinions of the Sixth Circuit in this case, the one addressing Harvis' claims and the one addressing Petitioners' claims, have been reported under identical captions. This citation and all subsequent citations are to the opinion addressing Petitioners' claims.

STATUTES INVOLVED

The statutes offered by Petitioners are supplemented with the statute governing the conduct in this case. §1981, before the 1991 Act, provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioners were terminated from Roadway in 1986 under similar circumstances and they sued Roadway claiming, *inter alia*, race discrimination under §1981 and Title VII (42 U.S.C. §2000e *et seq.*). (Petition at 3a.) On January 19, 1990 the district court determined that Petitioners failed to state claims under §1981. (Petition at 22a-24a.) Petitioners' identical claims under Title VII were tried to the district court during a one week trial in the Spring of 1990; Petitioners were unable to prove their claims. (App. at A1-A13.)

The Sixth Circuit determined on appeal, however, that Petitioners had sufficiently plead a claim under §1981, as that statute was interpreted by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). (Petition at 9a.) The Sixth Circuit remanded the case further proceedings under §1981, including the potential for a second trial with a jury and with the availability of compensatory and possibly punitive damages. (Petition at 14a.)

A brief summary of the facts of this case is warranted. Petitioners failed to attend disciplinary hearings scheduled for them on August 22, 1986. (App. at A4-A5.) Both were suspended two days based on their individual work records. (*Id.*) Both grieved the two day suspensions. (*Id.*) Both argued that they had received insufficient notice of the hearings and had they received sufficient notice they would have attended. (App. at A5.) Both were awarded two days of back pay. (App. at A6.)

Roadway notified Petitioners and the Union that new hearings would proceed within three days after the grievance awards were announced. (App. at A6.) Hearings were scheduled for Petitioners and other employees while they were on duty. (App. at A7-A9.)

Petitioners were ordered numerous times to attend their hearings. (*Id.*) Both refused. (*Id.*) Petitioners' hearings took place on September 26, 1986. (*Id.*) Both were terminated for their failure to obey several direct orders and for their accumulated work records. (App. at A9.)

Three white employees were scheduled for hearings at the same time. (App. at A6-A7.) One of those employees, like Petitioners, refused numerous direct orders to attend a hearing while on the clock and was terminated. (App. at A9-A10.) Another complied with orders to attend a hearing and was not terminated. (*Id.*) The third was not at work and on duty when his hearing was scheduled. (*See*, App. at A6-A7, A9-A10.)

SUMMARY OF ARGUMENT

Petitioners' claims for relief will not be enhanced by this Court's review of the question whether the 1991 Act should be applied retroactively. Petitioners assert that the "procedures and remedies" of the 1991 Act should be applied if this case is retried. (Petition at 7-8.) Petitioners, however, have not and cannot point to any change the 1991 Act could have on the procedure to be followed or the relief available when their claims are reprocessed by the district court. Specifically, Petitioners may already seek a jury trial and compensatory and punitive damages.

Petitioners' claim of a conflict between the Sixth Circuit and the Ninth Circuit is inaccurate. Below, the Sixth Circuit addressed §101[2] of the 1991 Act. In *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992), the Ninth Circuit addressed §113(b)[3] of the 1991 Act. *Id.* at pp. 1549-1550. Only the holding on the actual section at issue can be claimed determinative of the outcome of each case. The Sixth Circuit and the Ninth Circuit have not, therefore, rendered a decision in conflict "on the same matter." Rule 10.1(a).

The presumption against the retroactive application of statutes is clearly favored in American law. There is no reviewable conflict among the courts of appeals whether the 1991 Act should be presumed not to be retroactive. Any "apparent tension" is so far removed from the issues material to this case that Supreme Court review here is not warranted. *See, Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990).

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[2] §101 expands §1981 and is set out in the Petition at pp. 2-3.

[3] §113(b) authorizes the award of expert fees under Title VII as follows:

> (b) Civil Rights Act of 1964—Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

In rejecting retroactivity, the Sixth Circuit stated that its *reasoning* applied to the 1991 Act as a whole. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 497 (6th Cir. 1992). Other courts looking at other sections of the 1991 Act have emphasized that their *holdings* applied only to the particular sections considered in those cases. That difference in approach is not a conflict warranting a writ of certiorari. The Sixth Circuit's statements are broader than its holding, and *dictum* is not a sufficient basis for review by this Court.

In the district court, petitioners conceded that this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) applied to their claims. The Sixth Circuit concurred. There is no conflict among the courts of appeals on this issue. The issue is not one of national significance because the 1991 Act expands the scope of §1981. The addition of new language to §1981 to achieve that expansion only confirms that the prior protection afforded by the statute was limited. No question worthy of this Court's review exists here.

ARGUMENT

I. THE APPLICABILITY OF THE CIVIL RIGHTS ACT OF 1991 DOES NOT DETERMINE THE ENTITLEMENTS OF THE PARTIES IN THIS CASE.

Despite Petitioners' allegations at pages 5 through 8 of their Petition, this case would be a particularly poor case for the Court to select to decide whether the 1991 Act should be applied retroactively. Retroactive application of the 1991 Act or any of its individual provisions would not make Petitioners' claims more viable, would not change the procedures to be followed, and would not increase the potential type or amount of remedies available to Petitioners on remand in the district court. Petitioners may already seek a jury trial and compensatory and punitive damages in addition to the equitable relief they sought at their first trial.

Although the Sixth Circuit affirmed the district court's dismissal of Petitioners' race discrimination in firing claims, *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 491 (6th Cir. 1992), it explained that "the very basis of their complaint has always stemmed from retaliatory discharge." *Id.* at p. 494. Therefore, from the beginning, Petitioners have always understood their retaliation claims to encompass the same subject matter.

Neither Rivers nor Davison has or can point to any entitlement he would have under the 1991 Act that he does not now have under the 1866 Act. Petitioners have not and cannot show how applicability of the 1991 Act is an issue of concern to them in enhancing their chances of success on remand. Petitioners appear more interested in having the Court resolve an issue of ideological and political interest than in finally resolving their dispute with Roadway. Thus, this case would not be an appropriate selection to bring the issue of whether the 1991 Act applies retroactively into focus. The fulcrum of

the adversarial process—the motivation to obtain an outcome securing or defending a private litigants' rights—is sorely lacking. Selecting this case to resolve that issue would only unnecessarily delay the conclusion of this litigation.

Petitioners' proffer three reasons why this Court should accept this case for review; all three are easily dismissed.

First, Petitioners claim that §101 of the 1991 Act is at issue in many pending cases. (Petition at 7.) While that is true, Petitioners neglect to mention that the courts of appeals that have considered §101 have unanimously ruled against retroactivity; as noted above and as discussed in detail below, the Ninth Circuit decision in *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992) concerns whether §113(b) of the 1991 Act is retroactive not whether, as here, §101 of the 1991 Act is retroactive. The absence of any circuit conflict dispels the relevance of the amount of litigation on §101.

Second, Petitioners cite the Sixth Circuit's discussion of the 1991 Act "as a whole." (Petition at 7.) *See, Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 497 (6th Cir. 1992). Whether the Sixth Circuit rejected the retroactivity of the entire 1991 Act or just §101 is not relevant to Petitioners' cause. The difference between analyzing legislative enactments section by section or reviewing the entire act is simply not a material issue in this case because no party's rights can be affected by a ruling on the question. Petitioners have not shown that the more limited approach adopted by some courts has actually created irreconcilable results in judicial holdings.

Petitioners' third and final point, that this case is going to be retried anyway (Petition at 7-8), is the very reason why this case would be particularly inappropriate to select for further review. Because the Sixth Circuit's decision rendered irrelevant any concern over the applicability of the 1991 Act, its remand dictates that this case is not ripe for review.[4]

This case is unique not for the questions raised by Petitioners, but for the sole issue decided in Petitioners' favor by the Sixth Circuit. Heretofore claims of retaliation had not required a showing of racial animus, merely retaliatory conduct. Petitioners theorized and the Sixth Circuit approved the viability of claims for "discriminatory retaliation" under §1981 as it existed before the 1991 Act. Petitioners now have the opportunity to prove their claims.

Previously at the district level, Petitioners were only denied the right to proceed under §1981. The Sixth Circuit has granted Petitioners that right. Petitioners had nothing else at stake before the Sixth Circuit and have nothing more to gain before this Court.

There could hardly be a less appropriate case for the Court to review on the issue of the applicability of the 1991 Act. The applicability of the 1991 Act is simply not relevant or material in this case. Petitioners' request for a writ of certiorari should be denied.

[4] Petitioners allege the existence of a separate motion apparently seeking consolidation of their petition with petitions filed in other cases addressing the application of the 1991 Act. (Petition at 8.) If a motion exists, Roadway has not received a copy. In any event, the distinction in this case, the Sixth Circuit's remand of petitioners' claims which were found actionable, warrants quick disposal of Petitioners' petition. Roadway is opposed to any motion to consolidate and will file a formal response if it ever receives any such motion.

II. THE ESSENTIAL DETERMINATION OF THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER.

Petitioners' claim of a conflict is premised on the Ninth Circuit case *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992). (Petition at 8-15.) The only portion of the 1991 Act even marginally relevant to Petitioners' claims is §101. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 495 (6th Cir. 1992). In *Davis*, the Ninth Circuit was concerned only with §113(b) of the 1991 Act. *Davis v. San Francisco*. 976 F.2d 1536, 1549-1550 (9th Cir. 1992). Although both courts discussed the applicability of the 1991 Act as a whole, the broad language used was unnecessary to each decision; in the end each decision dealt only with a specific and different section of the 1991 Act. The distinction between the actual sections addressed negates Petitioners' suggestion of a present circuit conflict which must be immediately resolved by this Court.

III. THE PRESUMPTION AGAINST RETROACTIVITY DOES NOT IMPAIR PETITIONERS' RETALIATION CLAIMS.

Petitioners err in suggesting that the Court should use this case to resolve any conflict that remains between the decisions in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) and *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974). Two years ago, the Court chose not to reconcile the two lines of precedent in *Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990), because reconciliation was unnecessary to the resolution of the case. Reconciliation is similarly unnecessary in this case because the Sixth Circuit has determined that Petitioners' retaliation claims survive under §1981 as it existed *before* the 1991 Act. Application of the 1991 Act, based on a presumption favoring retroactivity, would not enhance Petitioners' prospects for success on remand.

The great majority of circuit courts have concluded that *Bowen* is the better rule of law and are appropriately applying a presumption against retroactivity absent a clear expression of legislative intent to the contrary.[5] Whatever tension remains may resolve itself and is not material to adjudicating the rights of the parties in this case.

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[5] *See, Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989); *Davis v. Omitowoju*, 883 F.2d 1155, 1170-1171 (3d Cir. 1989); *Leland v. Federal Ins. Adm'n*, 934 F.2d 524, 528-529 (4th Cir.) *cert. denied*, 112 S. Ct. 417 (1991); *Storey v. Shearson-American Exp.*, 928 F.2d 159, 161-162 (5th Cir. 1991). *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.) *cert. denied*, 113 S. Ct. 207 (1992); *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *DeVargas v. Mason and Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1392 (10th Cir. 1989) *cert. denied*, 111 S. Ct. 799 (1991); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 900 (D.C. Cir. 1992); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991) *cert. denied*, 112 S. Ct. 1584 (1992); *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964, note 6 (D.C. Cir. 1990); and, *Sargisson v. United States*, 913 F.2d 918, 922-923 (Fed. Cir. 1990).

IV. PETITIONERS' COMPLAINTS ABOUT JUDICIAL RESTRAINT OR THE LACK THEREOF DO NOT WARRANT SUPREME COURT REVIEW.

Petitioners describe as a "conflict" the difference between addressing the 1991 Act as a whole, as the Sixth Circuit did in this case, and limiting a decision to the specific section of the 1991 Act at issue. (Petition at 20-21.) That difference does not represent a true substantive conflict as much as an issue of judicial restraint. Clearly, whether the Sixth Circuit found §101 prospective or the whole 1991 Act prospective is a distinction without a difference to Petitioners' cause. To the extent Petitioners or other litigants disagree with statements not necessary to the outcome of this case, they may seek to distinguish those statements as *dictum*. The alleged "conflict" identified by Petitioners is truly more theoretical than real and is absolutely irrelevant to the respective rights and duties of the individual litigants in this case. Further involvement by this Court is not warranted.

V. THERE EXISTS NO CONFLICT RREGARDING THE APPLICATION OF *PATTERSON V. McLEAN CREDIT UNION*, 491 U.S. 164 (1989).

Whether this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) should apply retroactively was a new issue Petitioners raised for the first time in the court of appeals. In the district court, Petitioners conceded *Patterson* applied to their claims. (*See*, 8/25/89 Plaintiffs' Response to Show Cause Order at 1.) The Sixth Circuit addressed the issue and agreed that *Patterson* controlled. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 493 (6th Cir. 1992). Because this Court in *Patterson* applied its holding to the facts before it, the retroactivity of *Patterson* is a closed issue. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). *See, Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir. 1992).

Yet, Petitioners claim that the applicability of *Patterson* to pre-1991 Act cases should be reconsidered. (Petition at 21-25.) That, however, is not a relevant issue in this case. Despite *Patterson*, the Sixth Circuit remanded Petitioners' claims for further proceedings. There is, moreover, no conflict among the courts of appeals on this issue. Petitioners simply claim the Sixth Circuit erred; it did not. There is, finally, not even an issue of national concern. The 1991 Act dictates the diminishing role *Patterson* is and will be playing in the federal courts. There is, therefore, nothing to compel Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 4, 1993

APPENDIX

DECISION OF THE UNITED STATES DISTRICT COURT IN HARVIS, *ET AL.* V. ROADWAY EXPRESS, INC., *ET AL.*

(Filed October 18, 1990)

Civil No. C86-7955

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES T. HARVIS, JR., *et al.*,
Plaintiffs,

vs.

ROADWAY EXPRESS, INC., *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

POTTER, *J.*:

This cause came on for trial on plaintiffs Robert C. Davison and Maurice Rivers' complaint alleging that they were discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (Title VII). In an order dated March 14, 1989, this Court separated the trial of plaintiff Harvis from the trial of plaintiffs Rivers and Davison. The trial of plaintiff Harvis ended in a jury verdict in favor of defendant Roadway Express, Inc. (Roadway) on June 13, 1989. Since plaintiffs Rivers and Davison alleged only

violations of Title VII and, hence, were not entitled to have their claims heard by a jury, their case was tried upon the facts without the jury. Roadway is the only defendant which plaintiffs proceeded against at trial. The extensive briefing done by the parties has resulted in the Court having before it plaintiffs' pre-trial proposed findings of fact and conclusions of law, defendant's pre-trial proposed findings of fact and conclusions of law, defendant's post-trial proposed findings of fact and conclusions of law and plaintiffs' opposition thereto, and plaintiffs' post-trial proposed findings of fact and conclusions of law and defendant's opposition thereto. The Court has considered these materials and makes the following findings of fact and conclusions of law.

Preliminarily, the Court denies defendant's motion to dismiss plaintiffs' amended complaint (Doc. No. 282) for two reasons. First, this motion was filed out of time. On September 11, 1989, this Court issued a pre-trial order setting the trial of this cause to commence on February 27, 1990. Among other things, this Order also set the motion practice cut-off date at eight weeks prior to trial. Defendant's instant motion was filed February 27, 1990, the day of trial. For this reason alone, the Court would deny the motion. However, defendant's motion asks this Court to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Since this Court may reexamine subject matter jurisdiction at any point in the proceedings, it has examined the merits of defendant's motion. In doing so, the Court finds the motion not well taken.

Defendant contends that plaintiffs failed to assert their Title VII claims within 90 days after the EEOC notified plaintiffs of their right to bring suit. Assuming that the right-to-sue letter was issued June 30, 1987, as

defendant alleges, plaintiffs attempted to bring suit on these claims by moving for leave to amend their complaint on September 29, 1987. Clearly, plaintiffs' motion for leave to amend evidenced plaintiffs' intent to bring suit under Title VII. Defendant can claim no prejudice by the apparent confusion which resulted in plaintiffs' filing the amended complaint on October 18, 1988. Therefore, the Court has jurisdiction to address the merits of the case, and defendant's motion will accordingly be denied.

FINDINGS OF FACT

1. Plaintiffs are black male citizens of the United States and reside within the territorial jurisdiction of this Court.

2. Defendant does business in Toledo, Ohio and is an employer within the meaning of 42 U.S.C. §2000(b).

3. Plaintiffs began working for Roadway in 1972 in Akron, Ohio. Rivers began working on the dock, while Davison began working in the garage. Both plaintiffs transferred to the Roadway facility in Toledo, Ohio in 1975.

4. Roadway Garage Manager Ed Guy and Union business Agent Paul Toney agreed upon August 20, 1986 as the date on which a hearing would be held to discuss Davison's accumulated work record. On August 15, 1986, a letter was sent out to confirm this date. The hearing was postponed and rescheduled for August 22, 1986 by agreement between Mr. Guy and Mr. Toney.

5. Paul Toney was the union representative who was responsible for scheduling disciplinary hearings with defendant. Mr. Toney testified that he would mislead and even lie to Roadway in his attempts to stall hearings

in the hope of resolving the matter on an informal basis. Mr. Toney used this procedure for a number of employees, both black and white.

6. Toney testified that he believed that some time prior to August 22, 1986 Guy became aware of his stalling tactics and his history of avoiding disciplinary hearings. Plaintiffs were employees for whom Toney had employed such tactics. As a result, Guy demanded that a disciplinary hearing occur within 72 hours of the request. This procedure was a proper notification procedure due to a 1971 ruling.

7. On the morning of August 22, 1986 at approximately 7:30 A.M., Davison was told by foreman Bill Thompson that there was going to be a disciplinary hearing concerning Davison. Davison was told to go to the office and complied. When he arrived at the garage office, Davison told Guy that he had not received a letter in the mail informing him of a hearing and the [sic] he would not attend the hearing. Guy told Davison that he had received the proper notice for the hearing and that the hearing would be held whether he was there or not. Davison then left the office.

8. Davison was subsequently informed by Toney that he had received a two-day suspension as a result of the hearing that was conducted in his absence. That suspension was based on Davison's accumulated work record.

9. Davison filed a grievance alleging that his suspension was without just cause and without proper notification.

10. Guy and Toney also agreed upon August 20, 1986 as the date on which a hearing would be held to discuss Rivers' accumulated work record. On August 15,

1986, a letter was sent to confirm this date. That hearing was postponed and rescheduled for August 22, 1986 by agreement between Guy and Toney.

11. In the early morning of August 22, 1986, Roadway's supervisor Bill Thompson told Rivers that he had heard Rivers was having a disciplinary hearing later that day. Rivers stated that he had not received a letter notifying him of a hearing on August 22 and that as far as he was concerned no hearing would take place.

12. At approximately 7:30 A.M. on the morning of August 22, a Roadway foreman approached Rivers and told him to go to the office for a hearing. Although Rivers went to the office, he informed Guy that he had not received proper notice of the hearing. Although Rivers' Union Business Agent was present, Rivers replied that he did not think he should be there for the hearing and he was not properly represented. While Rivers claims he was excused, the Court finds that he was not.

13. Rivers subsequently received a letter from Roadway dated August 22, 1986 which indicated that as a result of a hearing on his accumulated work record, he was given a two-day suspension.

14. Rivers filed a grievance alleging that his suspension was without just cause and without proper notification.

15. The Toledo Local Joint Grievance Committee (TLJGC) convened and heard both grievances on September 23, 1986. During the hearings, plaintiffs argued that they had not received proper notice for their disciplinary hearings, that if they had received proper notice they would have been present at their disciplinary hearings, and that white employees Sedelbauer, Bradley

and Swartzfager should have had disciplinary hearings scheduled before plaintiffs as Roadway had requested hearing dates for those three individuals prior to requesting hearing dates for plaintiffs. Both grievances were granted based upon "improprieties," and both plaintiffs were awarded two days of back pay.

16. Disciplinary hearings had been requested for Swartzfager on June 6, 1986, Davison on July 14, 1986, Rivers on August 1, 1986, Sedelbauer on August 8, 1986 and for Bradley on August 11, 1986. Swartzfager had a disciplinary hearing scheduled for July 9, 1986 which did not occur as he was on vacation that week. Union Steward Eugene McCord was instrumental in the postponement of Swartzfager's hearing as he informed Guy on several occasions that Swartzfager's attendance record was not that bad and a hearing was not necessary.

17. Based upon these facts and the credible testimony of Dr. Cranny, black employees were not treated differently than white employees with respect to the scheduling of disciplinary hearings.

18. Shortly after the decision of the TLJGC was announced, Roadway's Labor Relations Manager James O'Neill announced there would be disciplinary hearings on employees Rivers, Davison, Bradley, Sedelbauer and Swartzfager within 72 hours. Both plaintiffs were present when O'Neill announced the upcoming hearings. Davison responded that he could not attend as he had a doctor appointment, and McCord responded that he could not attend as it was his day off. After some discussion, O'Neill and Toney agreed upon the date of September 26, 1986 at 7:00 A.M. for the hearings.

19. The race of Swartzfager, Sedelbauer and Bradley is white.

20. On September 25, 1986, B[R]oadway supervisor Robert Kresge delivered and read a written notice of hearing to Davison at work which stated that a hearing would be held for him on September 26, 1986 at 7:00 A.M. and asked him to sign a receipt acknowledging his upcoming hearing. Davison spoke with McCord and refused to sign the paper. Kresge left the written notice on a tool box next to Davison. Davison claims that the notice was not read to him and that he was not notified of the hearing date and time. McCord, however, testified that Kresge read the notice to Davison. Based on this testimony, the Court finds that Davison was told on the morning of September 25, 1986 that a disciplinary hearing would be held for him on September 26, 1986.

21. On September 26, 1986, Toney informed Davison that Roadway was having a hearing for him that day. He told Davison that Davison should attend the hearing because he had been given a direct order to do so and that Davison could be discharged if he did not attend the hearing. Davison maintained that he had not received the proper notice.

22. Davison was then approached by Roadway supervisors Broome and Gates who ordered him to go to the office for a hearing. Davison proceeded toward the office but stopped to talk to Toney and McCord.

23. Kresge approached Davison, in the presence of McCord and Toney, and again ordered him to go into the office, but Davison replied, "I'm talking to Paul, get out of my face." After some time elapsed, Davison walked into the office.

24. Once in the office, a heated discussion ensued between McCord, O'Neill, Toney, and Davison about whether the hearing should take place. Davison was informed that he could be discharged if he did not attend the hearing. Twenty-five minutes elapsed while the parties discussed whether or not to proceed. Finally, O'Neill told Kresge to start the hearing. Kresge started the hearing, and Davison and McCord left the office and returned to work.

25. On September 25, 1986 Rivers was approached by Kresge, who delivered and read to Rivers a written notice of hearing for September 26, 1986 and asked Rivers to sign a form acknowledging that a hearing would be held the next day. McCord, who was present at the time, told Rivers that he was not obligated to sign the form. Rivers refused to sign or take the document acknowledging that a hearing would be held the next day.

26. Shortly after 7:00 A.M. on September 26, 1986, Roadway Supervisors Broome and Gates approached Rivers at work. Broome ordered Rivers to go into the office because Roadway was going to have a disciplinary hearing concerning his accumulated work record.

27. After discussing this matter with Toney, Toney informed Rivers that failure to attend the hearing could result in discharge.

28. Kresge then went to the garage break room where Rivers was speaking with McCord and Toney, told them that the hearing was ready to begin and order Rivers to attend the hearing.

29. Later O'Neill approached Rivers, McCord and Toney and stated that the Company was ready to begin the hearing. Rivers, Toney and McCord went into the office. After O'Neill began the hearing, Rivers walked out.

30. Similarly, on September 25 and 26, 1986, Sedelbauer was directly ordered numerous times by various Roadway supervisors to attend a hearing on his accumulated work record scheduled for September 26, 1986.

31. Sedelbauer, like Rivers and Davison, refused those direct orders to attend his disciplinary hearing on September 26, 1986.

32. Swartzfager was also given direct orders to attend a disciplinary hearing to be held on September 26, 1986. Swartzfager complied with those orders and attended the disciplinary hearing. Swartzfager was given a disciplinary record of hearing but did not receive any other disciplinary time off without pay.

33. Throughout the time of these events on September 26, 1986, Rivers, Davison, Sedelbauer and Swartzfager were punched in and on the clock at work. As such, they were obliged to follow the orders of their supervisors unless the orders required unsafe actions.

34. Rivers was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record. Rivers was not discharged *because of* his race.

35. Davison was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record. Davison was not discharged *because of* his race.

36. Sedelbauer was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record.

37. The only employee to comply with the direct orders of management, Swartzfager, was not discharged on September 26, 1986 but was given a disciplinary record of hearing.

38. The greater weight of the evidence clearly demonstrates that there was no pattern or practice of different treatment of blacks from whites at Roadway's Toledo garage. From the statistical evidence introduced by defendant, the Court finds that blacks and whites were treated equally in the assignment of job duties and the scheduling of disciplinary hearings.

Conclusions of Law

1. This Court has jurisdiction over the parties and subject matter of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1331.

2. The Court does not judge the correctness of the defendant's business decision. *Cooper v. North Olmstead*, 795 F.2d 1265, 1271-72 (6th Cir. 1986); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986).

3. The disparate treatment theory of discrimination is the proper framework for analysis. *Kent County Sheriff's Ass'n v. County of Kent*, 826 F.2d 1485, 1492-93 (6th Cir. 1987), *rehearing denied*, 835 F.2d 1146 (6th Cir. 1987).

4. The United States Supreme Court outlined the appropriate analysis of disparate treatment claims in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *U.S. Postal Service Board of Governors*

v. Aikens, 460 U.S. 711 (1983). According to Burdine, plaintiffs must first establish a prima facie case of intentional discrimination, which defendant can rebut by producing a legitimate, nondiscriminatory reason for the discharge. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. If defendant meets this burden of production, plaintiffs must then prove that defendant's asserted motive is pretextual. The need to prove pretext merges with plaintiffs' ultimate burden of persuading the Court that he was the victim of intentional discrimination, a burden that plaintiffs retain at all times. *Id.* at 254-56. In *Aikens*, the Court held that if the trial judge denies defendant's motion for dismissal after completion of plaintiffs' case-in-chief and if defendant offers evidence in support of nondiscriminatory reasons for its action, the *Burdine* presumption "drops from the case" and "the factual inquiry proceeds to a new level of specificity." *Aikens*, 460 U.S. at 715. "The question then becomes for the trial judge, *Aikens* holds, whether plaintiff has carried the burden of persuasion of showing intentional discrimination as would be true in other civil litigation." *Weems v. Ball Metal & Chemical Div., Inc.*, 753 F.2d 527, 529 n.2 (6th Cir. 1985).

5. The Court finds that plaintiffs made out a prima facie case of disparate treatment. The elements of a prima facie case applicable to the fact situation presented here are as follows. First, plaintiffs must show that they are members of a class entitled to protection under the Civil Rights Act. Second, plaintiffs must show that they were subjected to adverse employment action.

Third, plaintiffs must show that they were qualified for their respective positions. Finally, plaintiffs must show that the employer either continued to solicit applications for the vacant positions or replaced plaintiffs with persons not within the protected class. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 313 (6th Cir. 1989); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984). In an appeal from this Court, the Sixth Circuit cautioned that a "[p]laintiff's burden with respect to establishing a prima facie case is not onerous." *Jackson*, 743 F.2d at 377. Plaintiffs have satisfied the second element through the introduction of proof that they were terminated. Defendant has not contended that plaintiffs were not qualified for their respective positions. Nor has defendant contended that it did not fill the positions that plaintiffs occupied. Therefore, the Court finds the third and fourth elements met.

6. In the present case, plaintiffs must prove not only that they were treated differently than the defendant's white employees, but also that this disparate treatment was the result of a discriminatory intent. *Smith v. Pan Am World Airways*, 706 F.2d 771, 773 (6th Cir. 1983). "The ultimate question to be resolved is whether the employer intentionally treated 'some people less favorably than others because of their race,' *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977), not whether the employer treated an employee less favorably than someone's general standard of equitable treatment." *Batts v. NLT Corp.*, 844 F.2d 331, 337 (6th Cir. 1988).

7. Plaintiffs have failed to carry their burden of proving by a preponderance of the evidence that their discharge was racially discriminatory. Plaintiffs have had their day in court. After weighing the testimony of the witnesses and considering all of the evidence, the Court finds that plaintiffs did not carry their ultimate burden of proof. Defendant has articulated legitimate, nondiscriminatory reasons for discharging plaintiffs, i.e., their repeated refusal to obey direct orders. Plaintiffs have failed to demonstrate that defendant's proffered reasons for their discharges were pretextual. Under the substantive standards applicable to Title VII cases, plaintiffs have not established that they were discharged from employment based upon their race.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion to dismiss be, and hereby is, DENIED; and it is

FURTHER ORDERED that judgment be, and hereby is, entered in favor of defendant Roadway Express, Inc. and against plaintiffs Maurice Rivers and Robert Davison.

/s/ JOHN W. POTTER
United States District Judge

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN HARVIS, *ET AL.* V. ROADWAY EXPRESS, INC., *ET AL.*

(Decided January 10, 1991)

RECOMMENDED FOR FULL TEXT PUBLICATION

No. 90-3103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR.,
Plaintiff-Appellant,

MAURICE RIVERS and ROBERT C. DAVISON,
Plaintiffs,

v.

ROADWAY EXPRESS, INC.,
Defendant-Appellee,

LOCAL 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Decided and Filed January 10, 1991

Before: MERRITT, *Chief Judge*; MARTIN and NORRIS, *Circuit Judges.*

MERRITT, *Chief Judge.* The Supreme Court decided *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989), narrowing the scope of discriminatory contract actions under 42 U.S.C. §1981, shortly after the jury returned a verdict for defendant on plaintiff's §1981 claim. The *Patterson* case forms the basis of plaintiff's novel argument on appeal. The plaintiff has appealed from the District Court's judgment for the defendant after a jury verdict on his race discrimination claim under §1981. He also appeals a judgment for defendant in his Title VII claim, a claim not subject to jury trial, arising out of the same basic facts. The District Court entered the Title VII judgment by applying the doctrine of collateral estoppel based on the jury's verdict on the §1981 claim. The plaintiff now asserts on appeal that his §1981 claim should not have been put to the jury (even though he requested a jury trial) and, therefore, contends that the jury's verdict for the defendant may not be used to preclude his Title VII claim. We disagree on grounds that plaintiff "invited the error," if indeed there was any error, when the District Court put the case to the jury.

Harvis has offered an unusual argument with regard to the effect of *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989). His argument is based on the effect of the *Patterson* case on the application of the doctrine of claim preclusion or collateral estoppel. He does not argue with the *res judicata* principle (arising from considerations of consistency, judicial economy and finality) that the jury's findings on the §1981 claim should control the judge's nonjury adjudication of the Title VII claim in the normal case in which a §1981 claim

and a Title VII claim arise out of the same facts. *See Restatement (Second) of Judgments* §24 (fact that various "legal theories casting liability on an actor may apply to a given episode" does not defeat claim preclusion even though the theories vary as to types of relief) and §25 (damages claim allowing jury trial "considered part of unitary claim [which includes a claim in equity] for purposes of merger and bar") (1982). Rather, plaintiff argues that the retroactive application of *Patterson* would leave him without a legally cognizable §1981 claim because *Patterson* narrowed the scope of §1981 to exclude his claim. Thus he argues that the lack of a valid claim means that the jury verdict should be disregarded for collateral estoppel purposes because the jury had no authority to return a verdict on a legally insufficient claim. Consequently, Harvis argues that his Title VII claim should be remanded to the District Court for new findings of fact because the jury findings and the District Court's judgment entry based upon them was "without meaning." Brief for Appellant at 5.

Defendant has offered a number of legal arguments in response to Harvis' argument, but most of the argument concentrates on the question of the retroactive application of *Patterson*. We do not find the issue of the retroactive application of *Patterson* to be dispositive in this case. Instead, we hold that the District Court must be affirmed under the doctrine of "invited error."

The doctrine of "invited error" refers to the principle that a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit. *See* 5 *Am. Jur.* 2d §713 (1962). The doctrine has been referred to as "a cardinal rule of appellate review," and federal appellate courts have applied the doctrine to a wide range of conduct. *Crockett*

v. Uniroyal, Inc., 772 F.2d 1524, 1530 (11th Cir. 1985); *see Gundy v. United States*, 728 F.2d 484 (10th Cir. 1984) (burden of proof); *Weise v. United States*, 724 F.2d 587 (7th Cir. 1984) (submission of evidence).

The Sixth Circuit has applied the doctrine of "invited error" on numerous occasions, although none of the applications resembles Harvis' case directly. The Sixth Circuit refused to exclude otherwise inadmissible evidence in *All American Life & Casualty v. Oceanic Trade Alliance Council Int'l, Inc.*, 756 F.2d 474, 479-80 (6th Cir.), *cert. denied*, 474 U.S. 819 (1985), because the plaintiff had "invited" witnesses to make the references it later sought to exclude. Similarly, the Sixth Circuit affirmed the denial of a motion for judgment notwithstanding the verdict in *American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 421 (6th Cir. 1984), because the motion was based on a defense abandoned earlier in the proceedings. *See also Garza v. Indiana and Michigan Electrical Co.*, 338 F.2d 623, 627 (6th Cir. 1964) ("One may not complain of rulings which he invited the court to make."); *Edwards v. United States*, 265 F.2d 909, 910 (6th Cir.), *cert. denied*, 361 U.S. 845 (1959) ("There is no warrant of course for the relieving the accused of the consequences of what appears to have been a planned defense stratagem [admission of incriminating testimony] by the device of condemning as 'clear error' of the trial court a seemingly calculated risk of defense counsel which happened not to achieve the intended result with the jury."); *Corbin v. Baltimore & Ohio Railroad Co.*, 234 F.2d 78, 81 (6th Cir. 1956) ("[A] party cannot be permitted to take advantage of errors which he has, even in good faith, invited or induced the district court to make.").

The doctrine of "invited error" is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. It is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel. Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error. Plaintiff cannot complain that the District Court allowed a jury to consider his §1981 claim. He requested a jury trial and thus "invited" the error of a jury verdict in his case. The consequences of plaintiff's action forecloses his request for a remand to the District Court. It is well-settled within the Sixth Circuit that both §1981 and Title VII carry the same standards of proof. Both §1981 and Title VII require that Harvis demonstrate discrimination by defendant in order to prevail. *See Daniels v. Board of Educ. of Ravenna City Schools*, 805 F.2d 203 (6th Cir. 1986); *Jackson v. RKO Bottlers*, 743 F.2d 370 (6th Cir. 1984), *cert. denied*, 478 U.S. 1006 (1986). Since a district court judge is bound by the jury's findings of fact in deciding whether a plaintiff is entitled to any remedial relief under Title VII, a remand in this case is unwarranted. *See In re Lewis*, 845 F.2d 624 (6th Cir. 1988).

That *Patterson* changed some of the elements of the §1981 statutory tort after the jury verdict does not alter the point that the jury found the facts common to both claims against plaintiff's position. The "error" of the District Court, if there was one, was to allow the jury to reach a verdict on a claim that, according to plaintiff, *Patterson* may now render legally insufficient. The

District Court had subject matter jurisdiction over the two claims even if *Patterson* means that the Court should have dismissed the §1981 claim or directed a verdict. Harvis has confused the basic distinction between a lack of jurisdiction and a failure to state or prove a legally sufficient claim. A dismissal for failure to state a claim does not strip a court of subject matter jurisdiction. *See* C. Wright, *Law of Federal Courts* 26 (4th ed. 1983).

Although plaintiff has offered a novel argument with regard to the effect of retroactive application of *Patterson*, he has not demonstrated why he should not be bound by the so-called "error" he induced the District Court to make. He decided to seek a jury verdict on his §1981 claim first, and thus "invited the error," if there was error, of a jury trial that resulted in a verdict for defendant, a verdict that forms a proper basis for the application of the doctrine of claim preclusion. Accordingly, the judgment below is AFFIRMED.

FEB 19 PAGE 17

Supreme Court, U.S.
FILED
JAN 21 1993
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No. 92-938

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

MAURICE RIVERS

AND

ROBERT C. DAVISON,

Petitioners,

V.

ROADWAY EXPRESS, INC.

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION TO MOTION FOR JOINT CONSIDERATION

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Petitioners, Maurice Rivers and Robert C. Davison, ("Petitioners") have moved the Court to jointly consider their petition with the petitions filed in: (1) Baker v. Gulf & Western Industries, 961 F. 2d 222 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3477 (1993); (2) Johnson v. Uncle Ben's, Inc., 965 F. 2d 1363 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3356 (September 29, 1992) (No. 92-737); (3) Landgraf v. USI Film Products, 968 F. 2d 427 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3371 (October 28, 1992) (No. 92-757); and (4) Kuhn v. Island Creek Coal Co., 1992 U.S. App. LEXIS 20996 (6th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3383 (November 3, 1992) (No. 92-787). Respondent, Roadway Express, Inc., ("Roadway")[1] received Petitioners' motion on January 12, 1993. Pursuant to Rule 21.4, Roadway's response is due on or before January 22, 1993, and this memorandum is timely submitted in accordance with that rule.

Petitioners proffer six (6) reasons why this Court should jointly consider this case with the above-noted cases; all six (6) are easily dismissed.

First, Petitioners state that by their calculation Roadway's brief in opposition to their petition was due January 5, 1993. (Motion at 1.) Roadway's brief was filed on January 5, 1993. This case is ready for the Court's consideration pursuant to Rule 15.5 and the Court should not delay consideration to consider Petitioners' tardy procedural motion.

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[1] Roadway's Rule 29.1 list was previously filed. (Brief of Respondent in Opposition to Petition for Writ of Certiorari at ii.) No amendment is necessary.

Second, Petitioners allege that the applicability of the Civil Rights Act of 1991 ("1991 Act") to pending cases is an important issue. (Motion at 1.) While that may be true, the applicability of the 1991 Act is not a material factor in determining the entitlements of the parties in this particular case. (See Brief of Respondent in Opposition to Petition for Writ of Certiorari at 8-10.) Because Petitioners have not and cannot show how the applicability of the 1991 Act would enhance their prospects for success on remand, the importance of the applicability of the 1991 Act to pending cases is not an issue this case has in common with the other cases cited in their motion.

Petitioners' third through sixth points all concern the alleged pendency of the previously noted cases and an alleged conflict between those cases and the Ninth Circuit's decision in Davis v. San Francisco, 976 F. 2d 1536 (9th Cir. 1992). (Motion at 1-3.) Some of the information Petitioners offer is outdated. Other claims Petitioners make are simply wrong.

The Court has already denied certiorari in Baker v. Gulf & Western Industries, 961 F. 2d 222 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3477 (1993).

Like the Sixth Circuit's decision in this case, none of the holdings in the previously noted cases are in conflict with the Ninth Circuit's holding on §113(b) of the 1991 Act in Davis v. San Francisco, 976 F. 2d 1536, 1549-1550 (9th Cir. 1992). (See, Brief of Respondent in Opposition to Petition for Writ of Certiorari at 6, 9, and 11.) The holding in Davis concerned the 1991 Act's

provision for the recovery of expert witness fees. In contrast, petitioners' discussion demonstrates the noted cases address: §101, which expands the scope of 42 U.S.C. (§1981); §102, which creates the potential for compensatory and punitive damages and a jury trial under Title VII (42 U.S.C. §2000e et. seq.); and §105, which creates a new burden of proof for employers defending against disparate impact claims. (Motion at 2-3.) In the end, therefore, each noted case dealt with a specific, and for the most part different, section of the 1991 Act, distinct from the section at issue in Davis.

The only cases that have dealt with the same section of the 1991 Act are this case, Johnson v. Uncle Ben's, Inc., 965 F. 2d 1363 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3356 (September 29, 1992) (No. 92-737) and Baker v. Gulf & Western Industries, 961 F. 2d 222 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3477 (1993). Those cases are from three different courts of appeals, and the courts in those cases are in agreement that §101 is not retroactive. Thus, the Court's consideration of the issues posed by the other noted cases would not correct Petitioners' erroneous assertion that issues worthy of the Court's review exist in this case.

Finally, none of the other cases present the circumstance unique to this case of claims approved by a court of appeals under §1981 as it existed before the 1991 Act -- claims which are awaiting further processing by the district court on remand. Here, Petitioners have already been granted the right to proceed under

§1981. Combining this case with others, where the applicability of the 1991 Act may be a material issue, would only unnecessarily delay the conclusion of this litigation. Because of that distinction, the Court should consider this case only on its individual merit,[2] and should deny Petitioners' request for a writ of certiorari.

CONCLUSION

Petitioners' motion to have the petition for writ of certiorari considered with other petitions should be denied.

Respectfully submitted,

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[2] If the Court considers this case with the other case involving Petitioners' counsel, Kuhn v. Island Creek Coal Co., 1992 U.S. App. LEXIS 20996 (6th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3383 (November 3, 1992) (No. 92-787), the Court should take care to note counsel's conflicting claims of which case is the "best or "ideal" case to accept for review. (Compare, Rivers Petition at 7, with Kuhn Petition at 19).

CERTIFICATE OF SERVICE

I, JOHN T. LANDWEHR, certify that I am a member of the bar of the Supreme Court of the United States, and I have caused the foregoing MEMORANDUM OF RESPONDENT IN OPPOSITION TO MOTION FOR JOINT CONSIDERATION, to be served by depositing the same, first class postage prepaid, in the United States Mail, this 21st day of January, 1993, addressed to:

Charles Stephen Ralston, Esq.
NAACP Legal Defense &
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99 Hudson Street, 16th Floor
New York, NY 10013

All parties requires to be served have been served.

John T. Landwehr
Counsel for Respondent

Supreme Court, U.S.
FILED
APR 30 1993
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No. 92-938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 2, 1992
CERTIORARI GRANTED FEBRUARY 22, 1993

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5.	Memorandum and Order of the United States District Court for the Northern District of Ohio, in *Harvis, et al. v. Roadway Express, Inc., et al.*, November 30, 1988	27a

LOCATION OF ADDITIONAL RECORD EXCERPTS NOT INCLUDED IN THE JOINT APPENDIX

6. Memorandum and Order of the United States District Court for the Northern District of Ohio, in *Harvis, et al. v. Roadway Express, Inc., et al.*,, January 9, 1990, reprinted in the appendix to the Petition for a Writ of Certiorari at pages 19a-24a.

7. Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio, in *Harvis, et al. v. Roadway Express, Inc., et al.*, October 18, 1990, reprinted in the appendix to the Brief of Respondent in Opposition to Petition for a Writ of Certiorari at pages A1-A13.

8. Decision of the United States Court of Appeals for the Sixth Circuit in *Harvis, et al. v. Roadway Express, Inc., et al.*, January 10, 1991, reprinted in the appendix to the Brief of Respondent in Opposition to Petition for a Writ of Certiorari at pages A14-A19.

RELEVANT DOCKET ENTRIES

2/22/87	1	Complaint filed	Summons issued to Attorney.
2/22/87	2	JURY DEMAND of Pltf. filed.	
1/23/87	7	ANSWER of Deft. Union filed. Mld. 4 p. WHS	
1/5/87	8	ANSWER of Deft. Roadway filed. Mld. 5 p. WHS	
9/18/87	52	MAGISTRATE'S REPORT & RECOMMENDATION filed. JGC. Copies mld. 11 p. WHS	
9/28/87	55	OBJECTION of Pltf. to Magistrate's R & R filed. Mld. 8 p. WHS	
10/8/87	62	RESPONSE of Deft. Roadway to Pltf's objections to Magistrate"s R & R filed. Mld. 8 p. WHS	
10/9/87	63	OPPOSITION of Deft. Roadway to motion to amend complaint filed. Mld. 8 p. WHS	
10/19/87	68	(169) 2ND MOTION of Pltf. to amend complaint filed. Mld. 14 p. WHS	
10/19/87	69	RESPONSE of Deft. Union to Pltf's. Objections to Magistrate's R & R filed. Mld. 40 p. WHS	

11/13/87	84	ORDER filed. JWP. Magistrate's R & R adopted; Deft's motion to strike Jury Demand granted. Copies mld. 7 p. WHS
11/16/87	88	MOTION of Deft. Roadway for summary judgment filed. Mld. 98 p. WHS
11/16/87	90	(225) MOTION of Deft. Roadway to separate trials on pltf's 301 Hybrid claims from Race Discrimination Claims filed. Mld. 6 p. WHS
11/16/87	91	(225) MOTION of Deft. Roadway to strike jury demand filed. Mld. 6 p. WHS
11/16/87	92	(225) MOTION of Deft. Roadway to bifurcate issues of liability & damages filed. Mld. 4 p. WHS
12/1/87	109	PRETRIAL ORDER filed. JGC. Pretrial held 12/1/87. Pltf. granted to 12/8/87 to file 3rd amended complaint. Copies mld. 1 p. WHS
12/1/87	113	MOTION of Deft. Union to dismiss / summary judgment re: claims of M. Rivers filed. Mld. 93 p. WHS
12/1/87	114	MOTION of Deft. Union to dismiss / summary judgment re: claims of R. C. Davison filed. Mld. 87 p. WHS
12/1/87	115	(225) MOTION of Deft. Union to dismiss / summary judgment re: claims of J. T. Harvis filed. Mld. 107 p. WHS

12/7/87	122	REPLY of Pltf. to opposition of Deft. Union to 2nd motion to amend complaint filed. Mld. 5 p. (leave to file was granted 12/1/87 - pleading not physically received until this time - pleadings was used for R & R filed. 12/2/87) WHS
12/8/87	124	(203) MOTION to Pltf. for leave to file 3rd amended complaint filed. Mld. 16 p.
12/11/87	126	RESPONSE of Pltf. to Deft. Roadway to motion to strike jury demand. Mld. 6 p.
12/11/87	127	2/4/5/7 RESPONSE of Pltf. to Deft. Roadway's motion to sever pltf's claims and for separate trial **AND** RESPONSE to motion to separate trials re: 301 claim **AND RESPONSE** to Deft. Union's motion for separate trials **AND** Deft. Roadway's motion to bifurcate liability & damages. Mld. 17 p. WHS
12/1/87	132	PT ORDER. JGC. Deft union granted to 12/28/87 to respond to pltf's motion for leave to file 3rd amended complaint; Union and deft Roadway granted leave to file on 12/28/87 their replies to pltfs' response to their motion for separate trials; Pltfs. to reply to union's response re amended complaint motion on or before 1/11/88. DJW
1/19/88	157	REPLY of pltfs' in supp of motion to file 3rd amended complaint. 4pp. DJW

5/17/88	169	ORDER. JWP. Mag's R&R is hereby adopted. Pltfs motion for leave to file an amended complaint is hereby granted. Copies mld. 1pg. cjr.
7/7/88	181	AMENDED ANS of Deft. Union. Mld. 6 p. WHS
1/29/88	194	(200) MOTION of Deft. Roadway for leave to answer pltf's 1st amended complaint & to amend motion for summary judgment instanter. Mld. 4 p. WHS
1/30/88	200	MARGINAL ENTRY ORDER granting Deft. Roadway leave to file answer to 1st amended complaint & amended motion for summary judgment. JGC. Copies mld. 1p. WHS
1/30/88	202	ANSWER of Deft. Roadway to 1st amended complaint. Mld. 5 p. WHS
9/1/88	203	ORDER JWP. R&R is hereby adopted. Pltf's motion to file 3rd amended complaint is hereby denied. Copies mld. 2pp. cjr.
10/18/88	218	1ST AMENDED COMPLAINT Mld. 6pp VI
11/7/88	220	(222) MOTION of Deft. Roadway to supplemental answer to pltfs 1st amended complaint. Mld. 2pp. cjr
11/9/99	221	OPPOSITION of pltf to Deft Roadway's motion to supplement its answer. Mld. 3pp. cjr

11/10/88	222	MARG. ENTRY ORDER granting deft Roadway's motion to supplement answer to pltf's 1st amended complaint. JWP. Copies mld. 1pg. cjr
11/10/88	223	SUPPLEMENTAL ANSWER of deft. Roadway to pltfs 1st amended complaint. Mld. 2pp. cjr
11/30/88	224	MEMO & ORDER. Deft Union's motions for summary judgment are hereby granted. Deft Company's motion for summary judgment is hereby granted in part and denied in part. All pending motions are hereby denied as moot. Copies mld. 6pp. cjr
2/16/89	228	P.T. ORDER. JWP. J. T. 6/6/89. Imp. date 6/5/89. P.T. 5/22/89 at 2:30 p.m. Copies mld. 1 py. cjr
3/14/89	229	MEMO & ORDER. Deft's motion to strike jury demand is hereby denied. Deft's motion to reconsider is hereby granted; Defts motion to bifurcate is hereby denied; Deft's motion to sever claims & for separate trials is hereby granted in part & denied in part. This case is scheduled for p.t. on 4/3/89 at 2:15 p.m. for purposes of scheduling a trial date for Davison & Rivers claims. Copies mld. 4pp. cjr

4/10/89	230	P.T. ORDER. JWP. Held 4/3/89. J.T. set 5/30/89 and 9/12/89. Imp. dates 5/30/89 and 9/11/89. P.T. dates 5/22/89 at 2:30 p.m. and 8/28/89 at 3:30 p.m. Any motions in limine are due 14 days prior to each trial date. Copies mld. 1pg.cjr
5/30/89	243	MIN. OF PROCEEDING. Held 5/30/89. Time: 6 hrs. Jury duly impaneled & sworn according to law and evidence. Opening statements made. Trial recessed but not concluded. Trial to resume at 9:00 a.m. on 5/31/89. cjr
6/1/89	244	MIN. OF PROCEEDING. Held 5/31/89. JWP. Time: 5.5. hrs. Pltf's case continued but not concluded. Testimony taken. Exhibits admitted. Court recessed until 6/1/89 at 9:00 a.m. cjr
6/2/89	246	MIN. OF PRO[CEEDING]. Held 6/1/89. Time: 6 hours. JWP. Trial resumed. Witnesses testified. Exh. admitted. Court recessed until 6/2/89 at 9:00 a.m.
6/2/89	247	MIN. OF PRO. Held 6/2/89. Time: 3 hours. JWP. Trial resumed. Witnesses testified. Exh. admitted. Court recessed until 6/5/89 at 9:00 a.m. cjr
6/5/89	248	MIN. OF PRO. Held 6/5/89. Time: 3.5 hours. Trial resumed but not concluded. Trial to resume 6.6/89 at 9:00 a. cjr

6/5/89	249	MIN. OF PRO. Held 6/6/89. Time: 5.5 hrs. Case con't but not concluded Trial to resume 6/7/89 at 9:00 a.m.
6/7/89	250	MIN. OF PRO. Held 6/7/89. Trial continued but not concluded. Pltf's case concluded. Defts case began. Testimony taken. Trial continued to 6/8/89 at 9:00 a.m. Time: 4 hours.
6/9/89	251	MIN. OF PRO. JWP. Time: 6 hrs. held 6/8/89. Trial resumed but not concluded. Trial to resume 6/9/89. cjr
6/9/89	252	MIN. OF PRO. Held 6/9/89. Time: 6 hours. Trial not concluded. Trial to resume 6/12/89 at 1:15 p.m. 1pg. cjr
6/13/89	253	MIN. OF PRO. Held 6/12/89. Time: 4 hours. Oral motions heard on admission of exh. Closing arguments made. Jury charged. Trial to resume 6/13/89 at 10:00 a.m. cjr
6/13/89	254	SPECIAL VERDICT. Finding of no discrimination based on race. 1pg. cjr
6/10/89	257	ORDER. JWP. Pltfs are hereby ordered to show cause within 21 days of this date why the claim under 42 § 1981 should not be dismissed in accordance with the recent Supreme Court decision on Patterson v. McLean Credit Union. Failure to timely respond to this order will result in said claim being dismissed with prejudice. Copies mld. 1pg. cjr

6/25/89	259	RESPONSE of pltf to show cause order dated 7/10/89. Mld. 13pp. cjr
9/25/89	260	ORDER granting pltf ext of time to file response to show cause order. JWP. Copies mld. 2pg. cjr
9/6/89	261	BRIEF of deft in support of entry of judgment on Harvis' Section 1981 and Title VII claim and in support of dism. of defts Rivers' & Davison's Section 1981 claims. 22pp w/31pp exh. cjr
9/11/89	262	P.T. ORDER. JWP. Held 8/28/89. J.T. 2/27/90 at 9:00 a.m. Emp. 2/26/90 at 9:00 a.m. P.T. 2/12/90 at 2:30 p.m. deft granted leave to reply to plts response to show cause order until 9/6/89. Pltf. is granted until 9/13/89 to file surreply. Copies mld. 1pg. cjr
9/13/89	263	REPLY of Pltfs to deft Roadway response to pltfs response to Patterson. Mld. 7pp with 4pp. cjr
1/9/90	264	MEMO & ORDER. JWP Judgment is hereby entered in favor of deft. on pltfs. Harvis' 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981 claims; and it is further ordered that the 42 § 1981 claims of pltf. against Rivers & Davison be and hereby are dismissed. Copies mld. 4pp. cjr
1/17/90	265	NOTICE. p.t. 1/26/90 at 10:00 a.m. Copies mld. 1pg. cjr

1/23/90	266	JUDGMENT ON DECISION BY COURT. JWP. Judgment is hereby entered in favor of deft. on pltf. Harvis' 42 U.S.C. Sec. 2000e et seq. and 42 U.S.C. Sec. 1981 claims. True copies mld. 1pg. cjr
1/31/90		NOTICE OF APPEAL of pltf. filed. Copies by clerk to attorneys Landwehr, Dixon, Lodge, Boal on 1/31/90. 3pp. cd
1/31/90		APPEAL FEE sum of $105.00 paid by pltf. Rept. #161819
2/1/90	269	TRIAL ORDER. JWP. Jury Impanelment 2/26/90 at 9:00 a.m. JT set for 2/27/90 9:00 a.m. Parties stipulate to the filing of motion in limine re: witnesses by 1/31/90. Copies mld. 1pp. BP
2/21/90	277	PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW of deft. Mld. 20pp. BP
2/27/90	282	MOTION of deft. Roadway to dismiss plts amended complaint. Mld. 12pp with 2pp exh. cjr
2/27/90	283	MIN. OF PRO. N.J. trial began. Time: 5.5 hrs. Pltfs case began. Testimony taken by Atty. Richard Bush admitted pro hac vice. Trial not concluded. Trial resume 2/28/90 at 9:00 a.m. cjr
3/5/90	284	MIN. OF PRO. N.J. cont'd. Time 5.5. hrs. Trial not concluded. Trial to resume 3/1/90 at 9:15 a.m. cjr

3/5/90	285	MEN. OF PRO. N. J. Cont'd. Time: 7.5 hrs. Trial continued but not concluded. Trial to resume on 3/2/90 at 9:15 a.m. 1pg. cjr
4/11/90	291	POST-Tr. Prop. findings of fact and concl. of law by Deft. 22PP. Mld.
4/11/90	296	PLTF's Post-tr proposed findings of fact and conclusion of law. 32pp. cjr
4/23/90	298	REPLY BRIEF of Deft. Roadway to plts post tr proposed findings of fact and conclusion of law. Mld. 25pp. cjr
4/24/90	300	REPLY of pltf to deft's post-tr. proposed findings of fact and concl. of law. Mld. 9pp. cjr
10/18/90	306	FINDINGS OF FACTS & CONCLUSIONS OF LAW. JWP. Deft's motion to dismiss is hereby denied; and it is ORDERED that judgment be, and hereby is entered in favor of deft Roadway Express, Inc. and against plts Maurice Rivers and Robert Davison. Copies mld. 11ppg. cjr
10/22/90	308	(310) MOTION of pltf for decision on motion to strike revised exh. K or in the alternative to reopen proofs and for reconsideration and amendment of judgment. Mld. 4pp. cjr

10/29/90	309	OPPOS to deft Roadway to plts motion for decision on motion to strike revised exh. K or in the alternative to reopen proof sand for reconsideration and amendment of judgment. Mld. 3pp. cjr
2/5/91		OPINION of Sixth Circuit, filed 1/10/91. Judgment is affirmed. dc
2/5/91		ORDER of Sixth Circuit, filed 1/10/91. ordered that the judgment of the district court is affirmed. Issued as mandate 2/1/91. Costs: (Awarded to appellee) Filing fee: None. Printing $240.00. dc (Note - Certified record was never sent)
3/18/91	310	MEMO & ORDER. JWP. Pltfs' motion to strike and for reconsideration of amended judgment are hereby denied. Copies mld. 2pp. cjr
4/17/91	311	NOTICE OF APPEAL of pltf. Copies by clerk to Landwehr on 4/17/91. dc
8/26/92	315	INFORMATION COPY of Opinion from USCA, decided and filed 8/24/92. REVERSE and REMAND for further proceedings under Sec. 1981. dc
8/31/92	316	TRUE COPY of Opinion from USCA, decided and filed 8/24/92. REVERSE and REMANDED for further proceedings under Sect. 1981. dc

10/23/92	317	JUDGMENT of USCA filed 8/24/92. Ordered of the judgment of the district court is reversed and the case is remanded for further proceedings under 42 U.S.C. 1981, in conformity with the Opinion. Issued as mandate 10/21/92. Costs: None. 1pg. dc
12/11/92	318	NOTICE of filing Petition for Certiorari, filed with the Supreme Court, filed 12/7/92, their #92-938. 1pg. dc
1/12/93	319	NOTICE, pretrial 2/8/93 at 9:00 a.m. Copies mld. 1pg. cjr
3/8/93	320	ORDER of Supreme Court, filed 2/22/93, their #92-938. Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to Question 1 presented by the petition. (This case is consolidated with No. 92-757, Barbara Landgraf v. USI Film Products, et al.) 1pg. dc

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN T. HARVIS, JR.,
MAURICE RIVERS, AND
ROBERT C. DAVISON,

Plaintiffs,

- vs -

Civil Action
No. C86-7955
Hon. John W. Potter

ROADWAY EXPRESS, INC. and
LOCAL 20, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND
HELPERS OF AMERICA,

Defendants.

FIRST AMENDED COMPLAINT

FACTS:

1. This is a claim for race discrimination, breach of collective bargaining contract, and breach of a union's duty of fair representation. Claims lie under 42 USC § 1981 and 2000e, 29 USC 185(a) and 159(a). Jurisdiction lies under 28 USC 1337.

2. Defendant Roadway Express Inc. ("Roadway") is an employer, as defined under the federal labor laws. It operates a facility in Toledo, Ohio.

3. Defendant Local 20 of the Teamsters, Chauffeurs Warehouseman, and Helpers of America ("Local 20") is a labor organization as defined in the federal labor laws. It represents a unit including mechanics at Roadway's facility in Toledo, and it owes them a duty of fair representation.

4. Plaintiffs James T. Harvis, Jr., ("Harvis"), Maurice Rivers ("Rivers"), and Robert C. Davison ("Davison") were Roadway mechanics represented by Local 20 until their discharge recently.

5. Each plaintiff is black, and each is and was prior to his discharge a member and supporter of TDU ("Teamsters for a Democratic Union), a reform caucus in Local 20 and the Teamsters nationally. Each was also a supporter of dissident activities and slates in Local contract and union election campaigns held in 1986.

6. The union's leadership was openly hostile to TDU and dissident factions, and facilitated a busload of its members and agents to go to a TDU convention in Romulus, Michigan, in October, 1983 to physically wreck a TDU meeting.

7. Harvis was discharged April 30, 1986, and Rivers and Davison were discharged September 26, 1986.

8. Each filed a grievance protesting his discharge. Harvis was informed that his grievance was denied on June 20, 1986. Rivers and Davison were informed that their grievance were denied on December 10, 1986.

9. Harvis' discharge was in violation of the contract in that it was taken without just cause. More particularly he was accused of gross insubordination and his accumulated work record in connection with an incident where a supervisor threatened to kick him and he responded. No blows were exchanged. The following day the supervisor backed off of his threat. Harvis worked to more day and then was fired.

10. Harvis' grievance was not fairly processed and the unit did not fairly represent him, in that, among other things.

a) his union agent recognized the charge against him was baseless, telling him h would have his job back the next day.

b) his union agent and the grievance committee which decided his case advised and pressured him to sign a paper waiving his legal rights during the grievance process;

c) when he refused to sign the paper the grievance committee improperly withheld its decision for a month;

d) grievants who have refused to sign the paper have never won their grievance;

e) a Roadway officer improperly attended and participated in the grievance decision, depriving the grievance panel of is neutrality and objectivity;

f) TDU members or supporters have consistently lost grievances comparable to grievances which non TDU members or supporters have won;

g) the decisions did not draw its essence from the contract.

11. Rivers' and Davison's discharge were taken without just cause. More particularly Roadway scheduled a hearing for them for September 26, 1986, based on conduct for which a grievance committee had previously exonerated them with backpay. The company did not notify them in writing of any obligation to attend a hearing. In the past, hearings have been held for them and their employees without their being present, and no adverse consequences followed the failure to attend. The only purpose of such hearings is to give the employee a chance, if he wishes, to

explain his side of the story. Rivers and Davison declined to attend the hearing and the hearing resulted in their discharges, allegedly based on the previous exonerated conduct and the failure to attend the hearing itself.

12. Rivers' and Davison's grievances were not fairly processed and the union did not fairly represent them, in that, among other things:

a) the company's charges against them were completely baseless;

b) the grievance committee which decided their cases advised and pressured them to sign a paper waiving their legal rights during the grievance process;

c) when they refused to sign the paper the committee improperly withheld its decision for a month;

d) grievants who have refused to sign the paper have never won their grievance;

e) TDU members or supporters have consistently lost grievances comparable to grievances which non TDU members or supporters have won;

f) the union agent improperly presented evidence to the grievance committee containing derogatory information about them outside the contractual nine-month period;

g) in the case of Davison, the company improperly presented altered affidavits to the committee;

h) the decisions did not draw their essence from the contract.

13. The company has in the last year discharged all but one of its black mechanics on baseless charges. That one was discharged some years ago, was reinstated only by

an arbitrator's decision, and more recently was threatened with discharge again.

14. The company has consistently disciplined and harassed its black mechanics treating them differently than white mechanics in comparable situations.

15. On or about October 27-29, 1986, plaintiffs filed timely charges with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC). On or about November 12, 1986, plaintiffs withdrew their OCRC cases so that the EEOC would investigate them on a joint basis. By letters postmarked July 8, 1987, plaintiffs received notices of right to sue Roadway from the EEOC.

CLAIMS

16. The discharges discriminated against the plaintiffs because of their race in violation of 42 U.S.C. § 1981.

17. The discharges violated the contract in violation of 29 U.S.C. 185(a).

18. The grievance decisions do not bar this proceeding, regardless whether the defects in them arose as a result of conduct by the company, the union or the grievance panel.

19. The union's grievance-handling violated the union's duty of fair representation under 29 U.S.C. 159(a).

20. The foregoing acts of the defendants were done with malice.

21. As a result of defendants' acts plaintiffs have suffered economic losses, mental anguish, and other damages, for which they are entitled to compensation.

WHEREFORE, plaintiffs respectfully request this court:

a) order defendants jointly and severally to pay plaintiffs' damages including punitive damages against Roadway;

b) order that plaintiffs be reinstated to their former positions with full backpay and benefits;

c) order defendants to pay plaintiffs' costs, interest and attorney fees, and

d) order any other just relief.

Respectfully submitted,

s/
Ellis Boal (P10913)
925 Ford Building
Detroit, MI 48226
Phone: (313) 962-2770

s/
Terry Lodge
618 North Michigan
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Dated: September 28, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

John T. Harvis, Jr., et al.,

Plaintiffs, Civil No. C86-7955

- vs - HON. JOHN W. POTTER

Roadway Express, Inc., et al.,

Defendants. ANSWER OF DEFENDANT ROADWAY EXPRESS,TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Now comes defendant Roadway Express, Inc., by and through its attorneys, and answers plaintiffs' first amended complaint as follows:

1. Answering paragraph 1 of plaintiffs' first amended complaint, defendant admits that claims of race discrimination, breach of collective bargaining contract and breach of a union's duty of fair representation may be actionable violations of certain specified federal statutes, but defendant denies each and every other allegation contained in paragraph 1 of the first amended complaint.

2. Answering paragraph 2 of plaintiffs' first amended complaint, defendant admits the allegations contained therein.

3. Answering paragraph 3 of plaintiffs' first amended complaint, defendant admits the allegations contained therein.

4. Answering paragraph 4 of plaintiffs' first amended complaint, defendant admits that it employed defendants. Defendant denies the remaining allegations contained in paragraph 4 of plaintiffs' first amended complaint.

5. Answering paragraph 5 of plaintiffs' first amended complaint, defendant admits that each plaintiff is black. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 5 of plaintiffs' first amended complaint and therefore denies said allegations.

6. Answering paragraph 6 of plaintiffs' first amended complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies said allegations

7. Answering paragraph 7 of plaintiffs' first amended complaint defendant admits the allegations contained therein.

8. Answering paragraph 8 of plaintiffs' first amended complaint, defendant admits that each plaintiff filed a grievance. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 8 of plaintiffs' first amended complaint and therefore denies said allegations.

9. Answering paragraph 9 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

10. Answering paragraph 10 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

11. Answering paragraph 11 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

12. Answering paragraph 12 of plaintiffs' first

amended complaint, defendant denies the allegations contained therein.

13. Answering paragraph 13 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

14. Answering paragraph 14 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

15. Answering paragraph 15 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

16. Answering paragraph 16 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

17. Answering paragraph 17 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

18. Answering paragraph 18 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

19. Answering paragraph 19 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

20. Answering paragraph 20 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

21. Answering paragraph 21 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

AFFIRMATIVE DEFENSES

22. Plaintiffs are misjoined as parties in this case as their claims do not arise out of the same transaction, occurrence or succession or series of transactions or occurrences and as there are no questions or law or fact common to plaintiffs' claim.

23. All or a portion of each plaintiffs' claims are barred by the applicable statute of limitations.

24. Plaintiffs and each of them have failed to exhaust available contractual or internal remedies.

25. Plaintiffs and each of them have failed to mitigate claimed damages.

26. Plaintiffs' complaints and each of them fail to state a claim upon which relief can be granted.

27. Plaintiffs' claims and each of them have been finally adjudicated and such claims are barred by the doctrine of arbitration and award.

28. Plaintiffs' claims and each of them have been finally adjudicated in other judicial or administrative forms and may not proceed herein under the doctrines of collateral estoppel or res judicata.

29. Plaintiffs and each of them are not entitled to a jury trial.

WHEREFORE, defendant prays that plaintiffs' first amended complaint be dismissed and that it may recover its costs herein expended, including reasonable attorneys fees and any other relief which the court deems appropriate.

EASTMAN & SMITH

s/

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241-6000

Attorneys for defendant
Roadway Express, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

John T. Harvis, Jr., et al.,

Plaintiffs, Civil No. C86-7955

- vs -

Roadway Express, Inc., et al.,

Defendants. SUPPLEMENT TO DEFENDANT ROADWAY EXPRESS, INC'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Now comes defendant Roadway Express, Inc. by and through its attorneys, and supplement its answer to plaintiffs' first amended complaint by interlineation as follows:

26: Plaintiffs' complaints and each of them fail to state a claim upon which relief can be granted. 42 U.S.C. § 1981 does not confer a private right of action for plaintiffs in this case. *Patterson v. McClean Credit Union*, U.S. Supt. Ct. No. 87-1707, argued October 12, 1988.

EASTMAN & SMITH
s/
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed November 30, 1988]

John T. Harvis, Jr., et al.,

Plaintiffs, Case No. C86-7955

- vs -

Roadway Express, Inc., et al.,

Defendants. MEMORANDUM AND ORDER

POTTER, J.:

This cause is before the Court on motions for summary judgment filed by defendant Roadway Express, Inc. (Company) and defendant Teamsters, Local 20 (Union), plaintiffs' opposition, defendants' replies, plaintiffs' response to new matters and defendant Union's reply. The three plaintiffs in this action are black and were employed as mechanics by defendant Company. Plaintiffs' claims arise from their discharges. Plaintiffs' first cause of action is a hybrid section 301/duty of fair representation claim against both defendants. Plaintiffs' second cause of action for race discrimination is only asserted against defendant Company.

Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R.

> Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "where the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 06 S. Ct. 2505, 2512 (1986).... In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*. 106 S. Ct. 1348, 1356-57 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1988). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that the is a genuine issue for trial." *Anderson*, 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." *Id.* at 257.

Defendant Union's claim that plaintiff Harvis' suit is barred by the statute of limitations is not well taken. The Court finds the action was filed by Harvis within six months. The Court will next address the motions for summary judgment on plaintiffs' hybrid section 301/duty of fair representations claim. Specifically, the Court will consider whether the Union breached its duty of fair representation to plaintiffs. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "A union's conduct may be sufficiently arbitrary to establish a breach of its duty to fairly represent its members when it handles a grievance in a 'perfunctory' manner, with caprice or without rational explanation." *Poole v. Budd Co.*, 706 F.2d 181, 183 (6th Cir. 1983). A plaintiff may establish a breach of the union's duty by evidence of personal hostility or bad faith. *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1340-1341 (6th Cir. 1975).

Defendant Union has set forth facts which, if uncontroverted, would entitle it to summary judgment as to all plaintiffs on the claim for breach of duty of fair representation. In effect, the Union has demonstrated that plaintiffs' case lacks evidence from which the court could find in their favor on this claim. The claims of all three plaintiffs involve their discharge from employment with the defendant Company. Grievances were filed in each plaintiff's case and each grievance was processed through final and binding arbitration in accordance with the collective bargaining agreement. The record in this case is voluminous. It includes hundreds of pages of briefing and thousands of pages of deposition testimony and exhibits. Despite this extensive record, plaintiffs have failed to present any evidence of arbitrariness, discrimination or bad faith in the processing of their grievances.

Plaintiffs argue that the Union officers who represented them were hostile to plaintiffs because they

were members of a dissident faction within the Union. Plaintiffs contend that this hostility was transferred to them during the grievance proceedings. Plaintiffs have presented no evidence in support of their contentions. To the contrary, each plaintiff testified in his deposition that the Union representative handling his grievance exhibited no personal hostility toward him. Plaintiffs claim that their grievances were arbitrated in a perfunctory manner is also unsupported by any evidence. Plaintiffs have failed to present specific facts creating a genuine issue of material fact in opposition to the Union's motion for summary judgment. Plaintiffs have not shown that the Union failed to take any reasonable step in processing their grievances through arbitration or that any complaint they have with the Union's handling of their grievances could have had a material impact on their outcome.

Plaintiffs continue to assert that the Union's failure to process race discrimination claims through the grievance machinery is a breach of its duty, despite this matter having already been adjudicated in this case. This claim is not well taken for the reasons set forth in the magistrate's Report and Recommendation filed June 6, 1988. The holding in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981) is not as broad in scope as plaintiffs suggest. The defendant union in that case was found to have breached its statutory duty based upon the facts found by the trial judge. Plaintiffs in this case have produced no evidence from which it could be determined that their situation was factually similar to *Farmer*. In sum, there is no material fact as to the duty of fair representation claim, and the Union is entitled to prevail as a matter of law on the claims of all three plaintiffs.

Plaintiffs assert that they are entitled to prevail on their hybrid section 301/duty of fair representation claim even if they cannot establish the breach of the Union's duty. The Court believes this assertion is contrary to the well established law as set forth in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

> The suit against the employer rests on §301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act.
>
> "Yet the two claims are inextricably interdependent. 'To prevail against either the company of the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.'" *Mitchell*, *supra*, at 66-67 (Stewart, J., concurring in judgment), quoting *Hines*, *supra*, at 570-571. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

Id. at 164-165. It is clear that plaintiffs may not maintain this claim against the Company where the Court has determined that the Union is entitled to summary judgment.

Nor may plaintiffs directly attach the arbitration awards adjudicating their grievances in this action. It is not the award itself which is at issue in this case, but the conduct of the parties to the arbitration. For this reason also, the issue regarding the applicable collective bargaining agreement is not an issue of material fact. This Court has already held that the decisions of the arbitral committee are final and binding on the parties in this case in its order of May 24, 1988. For example, plaintiffs' complaint does not allege a cause of action to set the awards aside, pursuant to the Arbitration Act, 9 U.S.C. §1, *et seq.*, under which the court could engage in a narrow, but direct review of the final decision of the arbitral committee. The Court does not determine whether plaintiffs would have standing to bring such an action, but only illustrates the contrast between this case and an action brought to set aside an award. Thus, the

final decision must stand as to all parties, and plaintiffs' hybrid section 301/duty of fair representation claim will be dismissed.

Plaintiffs' remaining claims are against the defendant Company for race discrimination under 42 U.S.C. §1981 and Title VII. The Company contends that plaintiffs are barred from litigating these claims because of the final and binding arbitration decisions. The showing required to prevail under either statute is essentially the same. *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 69 (6th Cir. 1985). The principles underlying Title VII and Section 1981 are essentially the same. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 416 (8th Cir. 1984). "In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974). The case before the Court provides all the more reason why plaintiffs' claims under Section 1981 and Title VII should not be barred by the final arbitration decision where plaintiffs had no opportunity to litigate their race discrimination claims in the grievance procedure.

> A Title VII case of sexual discrimination must be analyzed under the three prong test articulated by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff carries the burden of establishing a *prima facie* case. 450 U.S. at 252-53, 101 S. Ct. at 1093-94. If she establishes a *prima facie* case, the defendant must then articulate a nondiscriminatory reason for its actions. *Id.* If the employer does this, the burden is again on the plaintiff to prove that the articulated reason was pretextual and not the true reason, either by showing

> that a discriminatory reason was the more likely motivation, or by showing that the articulated reason is unworthy of belief. (Citations omitted.)

Mills v. Ford Co., 800 F.2d 635, 637 (6th Cir. 1986).

"The plaintiff must ultimately prove that the defendant intentionally discriminated against her. 450 U.S. at 253, 101 S. Ct. at 1093." *Id.* at 638. "Proof of the four *McDonnell Douglas* elements or other direct or statistical proof raises a rebuttable presumption of discrimination." (Footnotes omitted.) *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987).

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the fact of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. (Footnotes omitted.)

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

"The burden of production then shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the action taken." *Simpson*, 823 F.2d at 940.

> A plaintiff can establish that the legitimate, nondiscriminatory reason for the employment decision articulated by the defendant employer is pretextual in one of two ways. the first is to establish by a preponderance of the evidence that the discriminatory reason was the true reason motivating the employer's conduct. Alternatively, the plaintiff can prove pretext by showing that the proffered legitimate reason was false. (Citations omitted.)

Sims v. Cleland, 813 F.2d 790, 792 (6th Cir. 1987).

Plaintiffs claim that their discharges were racially motivated. The Court determines for the purpose of this motion that plaintiffs have each established a prima facie case under Section 1981 and Title VII. Defendants assert that plaintiffs' discharges were for the legitimate nondiscriminatory reasons advanced to the arbitration committee. Plaintiffs' claim that they were discharged for violations for which similarly situated white employees have received lesser discipline or no discipline and that the defendants' reasons are pretextual. The Court has thoroughly reviewed the pleadings, affidavits, depositions transcripts and other materials filed in support of and in opposition to summary judgment. It is this Court's opinion that genuine issues of material fact exist as to plaintiffs' claims under Section 1981 and Title VII against defendant Company.

The Court has also reviewed all the pending motions in this action relating to various issues of trial management. The Court believes the issues raised in these motions are now moot in light of the foregoing opinion. This cause will now proceed to trial against the defendant Company on plaintiffs' claims of race discrimination. Plaintiffs' claims under Section 1981 will be tried to a jury and the claim under Title VII will be tried to the Court. Title VII matters not appropriate for presentation to the jury under Section 1981 will be heard out of the presence of the jury.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that the defendant Union's motion for summary judgment be, and hereby are, GRANTED; and it is

FURTHER ORDERED that defendant Company's motion for summary judgment be, and hereby is GRANTED in part and DENIED in part; and it is

FURTHER ORDERED that all pending motions be, and hereby are, DENIED as moot.

S/S

UNITED STATES DISTRICT JUDGE

No. 92-938 (6)

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

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67 pp

QUESTION PRESENTED

Should § 101 of the Civil Rights Act of 1991, enacted during the pendency of this case, apply to plaintiffs' claims under 42 U.S.C. § 1981 when those claims are tried on remand?

PARTIES TO THE PROCEEDING

The Petitioners, plaintiffs in this action, are Maurice Rivers and Robert C. Davison, black former employees of the defendant. The Respondent is defendant Roadway Express, Inc., a national trucking company which operated a garage in Toledo, Ohio where Rivers and Davison worked.

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No. 938

IN THE

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OCTOBER TERM, 1992

MAURICE RIVERS AND ROBERT C. DAVISON,,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 973 F.2d 490 (6th Cir. 1992), and is set out at 1a-16a of the Appendix to the Petition for Certiorari.[1] The order of the Court of Appeals denying respondent's petition for rehearing and for rehearing *en banc* is unreported and is set

[1] Citations to the Appendix to the Petition for Certiorari are in the form "P.A. __."

out at P.A. 17a-18a. The opinion of the United States District Court for the Northern District of Ohio, Western Division, is unreported, and is set out at P.A. 19a-24a.

JURISDICTION

The decision of the Sixth Circuit was entered on August 24, 1992. Respondent's timely petition for rehearing *en banc* was denied on October 13, 1992. The Court granted the petition for *certiorari* on February 22, 1993. On March 23, 1993, the Clerk granted an extension of time within which to file this Brief up to and including April 30, 1993. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1981, as amended by § 101 of the Civil Rights Act of 1991, 105 STAT. 1071, P.L. 102-166, codified at 42 U.S.C. § 1981(b), and Title VII, 42 U.S.C. §§ 2000e-et seq. Prior to the 1991 Act, § 1981 provided as follows:

> All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

Section 101 of the Civil Rights Act of 1991 amends § 1981 as follows:

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended —

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> "(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

This case also involves provisions of the Civil Rights Act of 1991 relating to the Act's application to pending claims, including sections 109(c), 402(a) and 402(b), which provide in pertinent part:

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

* * *

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 402. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Title VII provisions prohibiting discriminatory discharge and retaliation provide in pertinent part:

SEC. 2000e-2. UNLAWFUL EMPLOYMENT PRACTICES

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

SEC. 2000e-3. OTHER UNLAWFUL EMPLOYMENT PRACTICES

(a) DISCRIMINATION FOR MAKING CHARGES, TESTIFYING, ASSISTING, OR PARTICIPATING IN ENFORCEMENT PROCEEDINGS. It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing about this title.

STATEMENT OF THE CASE

Petitioners Maurice Rivers and Robert C. Davison seek reversal of the decision of the United States Court of Appeals for the Sixth Circuit not to apply § 101 of the Civil Rights Act of 1991 to their claims of race discrimination in employment against their former employer, Roadway Express, Inc. ("Roadway" or "the Company").

1. Statement of Facts

The allegations and the facts of record in support of plaintiffs' contentions are as follows: Maurice Rivers and Robert Davison, who are both experienced black garage mechanics, worked successfully for Roadway from 1972 and 1973, respectively, until they were discharged in 1986. They were two of only four black employees working in Roadway's Toledo garage in 1986. On August 22, 1986, Roadway

managers told Rivers and Davison to attend disciplinary hearings on their accumulated work records. J.A. 17a;[2] Guy depo. 8/12/87, at 151.[3] For racially discriminatory reasons, the managers did not give Rivers and Davison the contractually required prior written notice routinely provided to white employees. Davison depo. 7/20/87, at 187-88; Rivers depo. 7/14/87, at 297-299; Guy depo. 8/12/87, at 148-151. Both plaintiffs refused to attend the hearings because of the inadequate notice. Both were suspended in their absence. They filed successful grievances complaining of the preemptory, racially discriminatory disciplinary proceedings. J.A. 17a; Rivers depo. 7/14/87, at 321-22; McCord depo. 9/3/87, at 285-86, 293. As soon as plaintiffs prevailed on their grievances, however, Roadway again convened disciplinary hearings, again without the requisite notice, and discharged the petitioners on September 26, 1986 after they refused to attend. J.A. 16a; McCord depo. 9/3/87, at 286; Rivers depo. 7/14/87 at 327; Guy depo. 8/12/87 at 168-69. P.A. 2a-3a. The discharges were retaliatory and racially discriminatory. *Id.* *See generally* P.A. 2a-3a.[4]

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[2] Citations to the Joint Appendix are referred to in the form "J.A. __."

[3] Citations in this form refer to depositions in the record below.

[4] The district court severed the claims of Rivers and Davison from those of their original co-plaintiff, James T. Harvis, Jr., on the ground that the claims were based on different factual circumstances and a joint trial could be prejudicial. Harvis' trial was conducted first, from May 30, 1989 through June 13, 1989, J.A. 8a-9a, with the Rivers and Davison jury trial scheduled to proceed starting on September 12, 1989. J.A. 8a. This Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), on June 15, 1989, immediately following Harvis' trial, and Rivers' and Davison's jury trial never took place.

2. Proceedings Below

Rivers and Davison sued under 42 U.S.C. §§ 1981, 2000e et seq., and demanded a jury.[5] J.A. 3a. The district court dismissed their § 1981 discriminatory and retaliatory discharge claims prior to trial based on this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). P.A. 1a-16a. *Patterson* construed the right to "make and enforce contracts" as not protecting workers from post-hiring race discrimination unless the discrimination was related to the making of a new contract (as in certain instances of promotion discrimination), 491 U.S. at 177, 185-86, or unless it affected the enforcement of contract rights (as in discrimination relating to a grievance or complaint of a breach of contract), *id.* at 177-78. After the court dismissed the § 1981 claims, it conducted a bench trial on the Title VII claims and found in favor of defendant Roadway. J.A. 11a-12a.

Rivers and Davison filed a timely appeal. J.A. 13a. While the appeal was pending, Congress enacted the Civil Rights Act of 1991, which among other things, overturned *Patterson*. Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Court of Appeals for the Sixth Circuit granted the parties leave to file supplemental briefs addressing the applicability of the 1991 Act.

In an opinion dated August 24, 1992, the Court of Appeals reversed. P.A. 1a-18a. The court held that the district court erred in dismissing the § 1981 retaliation claims because *Patterson* permitted claims of discrimination in

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[5] Plaintiffs also asserted claims against Roadway under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), and a hybrid § 301/duty of fair representation claim against the Union, Local Union 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. These claims are not at issue here, and the union is not a party in this Court.

enforcement of contracts, and Rivers' and Davison's "ability to enforce claimed contract rights was impaired because of their race." P.A. 8a. The Sixth Circuit thus remanded the case for a jury trial under § 1981 on the claims of discrimination in contract enforcement and directed redetermination by the district court of the racial discharge claims under Title VII if necessary in light of the jury's verdict, as required by *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). P.A. 9a-10a.

The Court of Appeals held, however, that when the case is tried to a jury for the first time on remand, the unamended version of § 1981 as construed by *Patterson* should apply, rather than the current version as amended by § 101 of the Civil Rights Act of 1991. P.A. 11a-14a. The Court thus applied *Patterson* retroactively even after it had been legislatively rejected. It held — nine months after Congress enacted the Civil Rights Act of 1991 repudiating *Patterson* and directing that the statute "take effect upon enactment" — that the 1991 Act did not apply to plaintiffs' pending § 1981 claims.[6] Section 101 of the Act defines § 1981's reference to the equal right to "make and enforce contracts" to include an equal right to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." *Patterson*, in contrast, limited § 1981 to discrimination in either the contract-formation stage, or in efforts to enforce contract rights, which lower courts have construed not to cover most discrimination on the job or in firing. *See, e.g., Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir.) *cert. denied*, 111 S.Ct. 2917 (1991).

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[6] Judge Siler concurred in the decision not to apply the amended version of § 1981, but dissented from the holding that *Patterson* does not bar the claims. P.A. at 14a-16a.

Under the remand order, only the claims of retaliatory discharge specifically linked to plaintiffs' efforts to enforce their contractual rights will be tried to the jury under instructions conforming to *Patterson*. The claims of discriminatory discharge and retaliation not linked to contract enforcement — e.g., not involving impairment of a right to grieve contract violations — will then be decided by the judge in light of the jury's verdict. If plaintiffs prevail on the claims governed by *Patterson*, they will be entitled under the Sixth Circuit's decision to a Title VII judgment and to backpay on all claims, but may seek damages only on the claim of discrimination in contract enforcement. Thus, the practical effects of not applying § 101 in this case are that a judge, not a jury, would determine plaintiffs' claims of race-based discharge, and even if the jury finds discrimination on the contract enforcement claim, no damages beyond backpay would be available on the racial discharge claim.

SUMMARY OF ARGUMENT

Section 101 of the Civil Rights Act amends 42 U.S.C. § 1981 to ensure that the § 1981 right to "make and enforce" contracts free from racial discrimination includes the right to "performance, modification, and termination of contracts" without regard to race, and the equal enjoyment of "all benefits, privileges, terms and conditions of the contractual relationship." The question here is whether § 101 applies to plaintiffs' pending employment discrimination claims against their former employer, Roadway Express, Inc., when those claims proceed to trial. For two independent reasons, § 101 does apply.

First, the plain language and structure of the Civil Rights Act of 1991 mandate that the Act be applied to this case. The Act directs that it "shall take effect upon enactment." It was enacted on November 21, 1991, and is thus applicable to cases pending as of that date. Two exemptions from the general rule of immediate effectiveness

expressly preclude the Act's application to certain pre-existing claims. The language of these exemptions and the fact that they were carved out of the general rule make clear that Congress intended the Act to apply to pre-existing claims which were *not* explicitly exempted.

Second, even if the Act's plain meaning did not require that it apply here, § 101 is presumed to apply to a pending case such as this one. The unanimous Court in *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974), held that new statutory provisions presumptively apply to pending cases unless the statute directs otherwise, or the application would create a "manifest injustice." The analysis under *Bradley* must focus on the particular provision sought to be applied, i.e. § 101 here, and not on the statute as a whole. There is nothing in the text or history of the Act that would overcome the *Bradley* presumption with respect to § 101.

Application of § 101 here also does not impose any "manifest injustice" under *Bradley*, and failure to apply it would be unfair to Rivers and Davison. Section 1981 as amended is a key component of federal protection against race discrimination in employment, and its prompt enforcement not only is in the national interest, but is necessary to ensure Petitioners a full remedy. Moreover, Roadway has no matured or vested rights that are implicated by application of § 101; the law's application here would merely afford plaintiffs additional remedies and procedures for violations already covered by Title VII. No new and unanticipated substantive obligations would be imposed on Roadway as a result of applying § 101. When Petitioners were fired, retaliatory and race-based discharge were both against federal law: Title VII has consistently prohibited such conduct, and because Roadway fired Rivers and Davison prior to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), § 1981 was also then assumed to prohibit it. Section 101 is thus merely restorative of the law as the

parties knew it when the conduct challenged in this case took place.

The *Bradley* presumption is consistent with the decisional law that preceded and followed *Bradley*. The characteristics of § 101 which make its application fair under *Bradley* also make it typical of the kinds of statutes that traditionally were applied to pending cases long before *Bradley*. Section 101 as applied here is remedial and procedural. It is also restorative. New laws that are remedial, procedural, or restorative are properly applied to pending claims. In contrast, statutes that disturb vested rights or that render conduct illegal after it has occurred, routinely have not been applied to pending cases, and such statutes are similarly inapplicable under *Bradley*'s manifest injustice exception.

This Court's cases since *Bradley* carry forward these same basic principles. For example, the Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), refused to apply a post-hoc change in rates for medical services already performed. *Bowen* thus involves the type of new law which, under *Bradley*, is not presumed to apply because it would impair vested rights and thereby amount to a manifest injustice. *Bowen*'s statement that "[r]etroactivity is not favored in the law" is best understood to use the word "retroactivity" as a term of art, referring precisely to those applications of new laws that would impermissibly disturb vested rights or change substantive legal rules. Thus, *Bradley* establishes a presumption that new laws apply in the absence of manifest injustice, and *Bowen* announces a presumption against application of laws when such application would be "retroactive," *i.e.* when it would cause the very injustice that the *Bradley* standard is designed to avoid. These principles require that § 101 be applied to the pending case.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CIVIL RIGHTS ACT OF 1991 REQUIRES ITS APPLICATION TO THE PENDING CASE

Based on the language of the 1991 Civil Rights Act, the Court should apply § 101 of the statute here. As this Court recently held, "[t]he starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)). Thus, "where the Congressional intent is clear, it governs." *Id.* The language of the Civil Rights Act of 1991 expresses Congress' clear intent that the Act apply to pending cases. *Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993).

Three provisions of the Civil Rights Act of 1991 expressly address the applicability of the Act to pending cases. Section 402 contains two of those provisions — the general rule requiring immediate application of the 1991 Act (in subsection 402(a)) and one exception to that rule (in subsection 402(b)):

> SECTION 402. EFFECTIVE DATE.
>
> (a) In General. — Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
>
> (b) Certain Disparate Impact Cases. — Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.[7]

Additionally, § 109 states, in relevant part:

> SECTION 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.[8]
>
> * * *
>
> (c) Application of Amendments. — The amendments made by this section shall not apply with respect to conduct occurring before the date of enactment of this Act.

These provisions, viewed in light of accepted principles of statutory construction, require that the Act be applied to pending claims not specifically excepted. These are the only provisions in the entire Act regarding when it applies, and not one word suggests that the Act was not intended as a general matter to apply to pending cases.

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[7] Section 402(b), excepting "certain disparate impact cases" from the Act, is a special provision proposed by Alaska Senator Murkowski, who selected the filing and decision dates referred to in order to ensure that the provision excepts only *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989). Section 402(b) relieves Ward's Cove Packing Company from the obligation to defend itself under the 1991 Act's standards.

[8] Section 109 extends the protections of the Civil Rights Act of 1964, as amended, to United States citizens working overseas for American companies, and thus overrules *EEOC v. Arabian American Oil Co. & Aramco Serv. Co.*, 499 U.S. ___, 111 S. Ct. 1227 (1991).

Even standing alone, § 402(a) makes clear that § 101 applies to petitioners' § 1981 claims. Section 402(a) states the general rule for application of the 1991 Act. It explicitly provides that the Act must "take effect upon enactment." The changes in the law must be construed as effective and binding upon the enactment date, November 21, 1991, which was well before the Court of Appeals issued its August 24, 1992 remand order. Section 1981 as amended by § 101 — rather than the pre-Act version of § 1981 as construed in *Patterson* — must apply in all proceedings in this case after November 21, 1991. The consequence of applying § 101 would be that all of plaintiffs' race discrimination claims, whether they involve retaliation for contract enforcement or not, would on remand be tried to the jury, and damages would be available if plaintiffs prevail. The Sixth Circuit, however, erroneously decided that only the contract-enforcement claims should go to the jury and provide a basis for an award of damages, and that even if the jury finds that the Company was racially motivated, the racial discharge claims should be redetermined by the judge. That decision contradicts the 1991 Act's express terms requiring courts to give the statute effect as of its enactment date, November 21, 1991.

The language of the 1991 Act is clear notwithstanding that it does not utilize words such as "prospective" or "retrospective." Indeed, in order to be clear with respect to its applicability or non-applicability to pending claims, a statute need not refer to pending or pre-existing claims specifically, either by way of inclusion or exclusion. In *Kaiser Aluminum Corp. v. Bonjorno*, 494 U.S. 827, for example, the statute did not state in so many words that it was inapplicable to pending claims. The Court, however, drew inferences from the language and structure of the law and held based on those inferences that the "most logical reading of the statute" on its face was that it did not apply

to pending claims. *See also Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (holding that "the words of the statute must be read in their context and with a view to their place in the overall statutory scheme"). The inferences to be drawn from the plain language and structure of the 1991 Act are far more straightforward than those this Court made in *Bonjorno* in reaching the conclusion that the statute in that case was clear on its face.[9]

The "most logical reading" of the 1991 Act requires application of § 101 to Rivers' and Davison's § 1981 claims, because where Congress intended the Act *not* to apply to pending claims, it said so. Sections 402(b) and 109(c) are the only two exceptions to § 402(a)'s general mandate that the 1991 Act "take effect upon enactment." Section 402(b) forbids immediate application of the Act to a particular pending case, and § 109(c) forbids application of the Act to pre-existing claims regarding discrimination overseas. The presence of those two exceptions compels the conclusion that § 101, which is not subject to any such exception, must be applied to pending cases such as this one.

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[9] The statute at issue in *Bonjorno* nowhere referred to pending claims, and did not state that it was prospective only. Rather, the Court concluded that the statute plainly did not apply to the pending claims in *Bonjorno* because it referred to calculation of interest "from the date of the entry of the judgment....," 494 U.S. at 838, and because it referred to "*the* rate" and "*a* rate" of interest, *id.* (emphasis in opinion). The Court viewed these terms as meaning that a single rate should be applied, and that it should be the rate that was in effect on the date of entry of the judgment, so that the post-judgment Act could not apply. *Id.* at 839-40. Thus, although the dividing point between cases with pre-Act judgments and cases with post-Act judgments was not specified by the legislation, the Court said that it was clear because that was "the most logical reading of the statute." *Id.* at 838.

That § 402(a) establishes a rule of application *different* from §§ 109(c) and 402(b) is emphasized by the particular terms Congress used. Section 402(a) controls "*except* as otherwise *specifically* provided." (Emphasis added). This language makes plain that the only other specific provisions regarding applicability of the Act — §§ 109(c) and 402(b) — are *exceptions* to the general rule stated in § 402(a). Similarly, § 402(b) controls "*notwithstanding any other provision* of the Act." The only "other provision" even potentially relating to the applicability of the Act in the circumstances described in § 402(b) is the general rule in § 402(a). If § 402(a) already excluded all pre-existing claims, both § 402(b) and § 109(c) would be unnecessary surplusage.

The conclusion that § 402(a) contemplates application of the Act to pre-existing claims not exempted by §§ 109(c) and 402(b) is dictated by two well established canons of construction. First,

> [w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983) (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). The Court this Term unanimously applied this rule in *Leatherman v. Tarrant County*, 61 U.S.L.W. 4205, 4207 (March 3, 1993), to hold that no heightened standard of particularity applies to the pleading of § 1983 claims. Federal Rule of Civil Procedure 9(b) requires special particularity in pleading certain actions, but does not include § 1983 claims among them, so the Court held that § 1983 claims are not subject to the requirement of special

particularity. The Court in *Leatherman* applied the venerable rule "expressio unius est exclusio alterius," *id.*, or, as Black's Law Dictionary translates, "the expression of one thing is the exclusion of another." The fact that the 1991 Act exempts from § 109, and from that section alone, "conduct occurring before the date of enactment," can only be read as a decision *not* to place any such limitations on the other provisions of the Act. Similarly, the decision specially to exempt the *Wards Cove* case from the Act's provisions implies that the Act does not exempt other pending litigation, such as this case.

A second canon of statutory construction supporting application of § 101 in this case is the rule against construing any statutory provision as redundant. As this Court held in *United States v. Menasche*, 348 U.S. 528 (1955), "[t]he cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section...." *Id.* at 538-39 (internal quotations marks and citations omitted). This rule was reaffirmed last Term in *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992), in which the Court held that "a statute must, if possible, be construed in such a fashion that every word has some operative effect."[10] If § 402(a) were construed to bar application of the Act to conduct occurring before the date of enactment, § 109(c)'s directive that § 109 "shall not apply

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[10] *See, Kungys v. United States*, 485 U.S. 759, 778 (19) (holding that "no provision [of a statute] should be construed to be entirely redundant"); *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (stating that "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (holding that reading a statute to render a section "redundant or largely superfluous" violates "the elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative").

with respect to conduct occurring before the date of enactment" would be a mere reiteration of a rule already laid down generally by § 402(a). Similarly, if § 402(a) barred application of the Act to *all* pending cases, there would be no need to enact 402(b), barring its application to one specific pending case. *See Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1960) ("If there is a big hole in the fence for the big cat, need there be a small hole for the small one?") (*quoting Polaroid Corp. v. Commissioner of Internal Revenue*, 278 F.2d 148, 153 (1st Cir. 1960).[11]

The Court of Appeals in this case misapplied the rules of statutory construction by relying on extraneous statements to reject the statute's plain meaning. Although the court acknowledged plaintiffs' contention that "retroactivity is implied because two sections are expressly made prospective," it dismissed that plain language implication by drawing on a passing reference in a statement accompanying the President's veto of the Civil Rights Act of 1990, which contained a completely different effective date provision, and on Congress' failure in 1990 to override that veto. P.A. 12a.[12] The court below adopted this analysis

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[11] To read §§ 109 and 402(b) as mere "insurance policies" adopted to make doubly clear in certain instances that the Act shall not apply is to ignore this basic rule against construing statutes to render provisions redundant. *E.g., Butts v. City of New York Dep't of Hous. Preservation and Dev.*, No. 92-7850, 1993 WL 85026, at *11 (2d Cir., Mar. 24, 1993) (citing cases). If every redundancy could be called an insurance policy, this rule would be turned on its head. The very notion of a provision being an "insurance policy," or reiteration of another provision, contravenes the well established rule that each statutory provision must be read to have independent meaning.

[12] Section 15 of the 1990 Act, passed by the House and Senate in October 1990, made the *Patterson* provision applicable to "all (continued...)

from *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377 (8th Cir. 1992), in which the court inferred from the Senate's failure by a single vote to override the 1990 veto that Congress "knew from their 1990 experience that, because of the President's veto power, *they could not enact a law [in 1991] that purported to legislate retroactively*." *Id.* (Emphasis in original). The bill President Bush signed in 1991, however, contained numerous provisions that he deemed unacceptable in his 1990 veto message, including the right to a jury trial, the availability of punitive damages, and compensatory damage awards up to $300,000.[13] In addition, both *Fray* and the court in this case ignored the fact that in 1991, attempts to *preclude* application of the act to conduct occurring before its effective date were also repeatedly defeated.[14] While the lower court in this case correctly concluded that the legislative history on the applicability of § 101 to pending claims reflects "conflicting views," P.A. 12a, a few sentences later it erroneously relied

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[12](...continued)
proceedings pending on or commenced after June 15, 1989" and allowed courts under certain circumstances to vacate completely final judgments "as to which the rights of any of the parties thereto have become fixed and vested." H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 10 (1990).

President Bush's October 22, 1990 veto message included a passing reference to the bill's "unfair retroactivity rules" — a reference not to the application of the Act to pending cases but rather to the authorized reopening of closed and dismissed cases as to which all appeals had been exhausted. *See* 136 Cong. Rec. S16562 (daily ed. October 24, 1990).

[13] *Compare* 42 U.S.C. § 1977A(b) and (c) *with* 137 Cong. Rec. S16562 (daily ed. Oct. 24, 1990).

[14] *See* 136 Cong. Rec. H6747 (daily ed. Aug. 3, 1990), *rejected at id.* 6768; 137 Cong. Rec. H3998 (daily ed. June 4, 1991), *rejected at id.* 3908.

on legislative history as if it were unambiguous and thereby undermined the clear message of the statute's language.[15]

II. THE RELEVANT LEGAL PRESUMPTION REQUIRES APPLICATION OF § 101 OF THE CIVIL RIGHTS ACT OF 1991

A. SECTION 101 PRESUMPTIVELY APPLIES UNDER *BRADLEY V. RICHMOND SCHOOL BOARD*

Because the language of the Act is clear, the statute's plain meaning is a sufficient ground standing alone to require reversal of the decision of the Sixth Circuit. If, however, the Court disagrees that the statute's text in itself requires application of § 101 to future proceedings in this case, the presumption in favor of retroactivity independently requires that result.

In *Bradley v. Richmond School Board*, this Court unanimously held that

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

416 U.S. 696, 711 (1974), *citing United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed 49 (1801). *See Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268 (1969). *Bradley* applied § 718 of the 1972 Emergency School Aid Act, which provided for

[15] Unless legislative history is unequivocal in opposition to application of new legislation to pending cases, it cannot be read to alter the textual message of the statute. *Regan v. Wald*, 468 U.S. 222, 237 (1984); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982); *see Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

attorney's fees for school desegregation litigation for time spent on the case prior to the law's effective date. The Court of Appeals denied a fee award, asserting that statutes should not be applied to conduct occurring before their effective date unless Congress clearly mandated such application. *See* 416 U.S. at 715 n. 20. This Court reversed, holding that "we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.* at 715. Rather, the correct presumption is precisely the opposite: a law is presumed to apply unless it directs otherwise or its application would be unjust. *Id.* at 711.

This Court has repeatedly reaffirmed *Bradley*. In *Hutto v. Finney*, 437 U.S. 678, *reh'g denied*, 439 U.S. 1122 (1979), the Court applied the Civil Rights Attorney's Fees Awards Act of 1976 to a case that was pending when the Act was passed, based in part on "this Court's general practice" of applying to pending cases statutes that are silent as to their applicability. *Id.* at 694 n. 23.[16] In *Cort v. Ash*, 422 U.S. 66 (1975), the Court followed *Bradley* to apply a new law giving the Federal Elections Commission jurisdiction over a pending challenge to misuse of corporate funds: "[T]he Amendments constitute an intervening law that relegates to the Commission's cognizance respondent's complaint.... [O]ur duty is to decide this case according to the law existing at the time of our decision." *Id.* at 76-77 (citing *Bradley*). *See Bennett v. New Jersey*, 470 U.S. 632, 639 (1985) (reaffirming *Bradley* and declining under the "manifest injustice" exception to apply a 1978 amendment establishing new substantive standards for Title I expenditures to funds already spent under earlier grants); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16

[16] *Hutto* also illustrates that Congress legislates in reliance on *Bradley*. *See id.* at 694 n. 23 (*quoting* House Report which acknowledges *Bradley* standard).

(1981) (following *Bradley* to hold that an appellate court must apply the law in effect at the time it renders its decision); *see also, Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987) (relying on *Thorpe* and *Schooner Peggy*).[17]

Bradley mandates application of the Civil Rights Act of 1991 to this case unless there is "statutory direction or legislative history to the contrary," or unless application of the Act would result in "manifest injustice" to the defendant. None of these conditions obtains here.

1. No Statutory Direction or Legislative History Contravenes Application of § 101

First, there is no language in the Civil Rights Act of 1991 that forbids its application to pending cases. Even if the Court disagrees with Point I, supra, and holds that the text is unclear as to whether the statute applies to pending cases, Point I certainly demonstrates that the statutory text cannot be read as clearly *precluding* its application to *all* pending claims.

Second, the legislative history of the Act does not preclude its application to pending cases. The context, purpose and history of the statute are consistent with application of § 101 here. The original, bipartisan sponsors and leading proponents were Senator Kennedy in the Senate and Representatives Edwards and Fish in the House. Each of them insisted that the Act applied to pending cases, unless in a particular case that application would be

[17] Decisions upon which Roadway relied below to urge that *Bradley* was an aberration which should not be followed are actually consistent with *Bradley* and support application of § 101 here. *See infra*, Point II.C.

manifestly unjust.[18] The views of these sponsors were the same as those reflected in the analysis agreed upon in the 1990 committee reports, which recognized that the rule in *Bradley* controlled and generally favored application to pending cases.[19]

Senator Danforth disagreed with Senator Kennedy about which legal presumption, if any, was likely to govern application of the Act to pending cases. 137 Cong. Rec. S15483-85 (daily ed. Oct. 30, 1991) (interpretative memorandum introduced by Sen. Danforth). Senator Danforth believed that applicability under the Act should be decided not under *Bradley*, but under *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), and the opinion of Justice Scalia in *Kaiser Aluminum v. Bonjorno*, 494 U.S. at 840. 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991). Senator Danforth explicitly acknowledged, however, that the views he expressed "may not be the interpretation of Senator Hatch or Senator Kennedy or anyone else." 137 Cong. Rec. S15325 (daily ed. Oct. 29, 1991). These views do not amount to a congressional mandate overriding the *Bradley* presumption.

[18] 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991), *id*. S15936 (daily ed. Nov. 5 1991) (remarks of Senator Kennedy approving of the general rule that new legislation is applied to pending cases); 137 Cong. Rec. H9530-31 (daily ed. Nov. 7, 1991) (remarks of Representative Edwards underscoring importance of application of Act to pending cases to avert many years of future enforcement of repudiated law, and to avoid conferring an undeserved windfall on defendants); *id*. at H9549 (remarks of Representative Fish, concurring with Rep. Edwards and stating "I think it should be clear that the bill applies to pending cases").

[19] H.R. Rep. 101-644, pt. 2, at 45 (101st Cong., 2d Sess. 1990); S. Rep. 101-315, at 59 (101st Cong. 2d Sess. 1990).

The extraordinary lengths to which Congress went to add the § 402(b) exception to a version of the Act which already contained § 402(a) also forecloses the possibility that, under § 402(a), the Act applies only prospectively. Alaska Senator Murkowski sought the § 402(b) exception for Ward's Cove Packing Company alone, and he explicitly said so in seeking support for it. Murkowski assured his colleagues that the *Wards Cove Packing Co. v. Atonio* case is the only case that fits the general-sounding description in 402(b). 137 Cong. Rec. S15954 (daily ed. Nov. 5, 1991). The inclusion of this section was necessary only because without it, Congress understood that the Act *would* have applied to the Ward's Cove Packing Company pursuant to § 402(a). When the 1991 Act passed the Senate on October 30, 1991, however, § 402(b) was inadvertently omitted. Senator Dole then took the extraordinary step of insisting that the bill be returned to the Senate floor for further debate and a separate vote to add this provision.[20] When the bill was presented for a second vote, both supporters and opponents of the § 402(b) exemption in the House and Senate concurred that its effect was to exempt the Wards Cove Company from the 1991 Act standards in the litigation still pending against it (a result that the supporters lauded and the opponents decried). This controversy would have

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[20] *See generally* 137 Cong. Rec. S15950-68 (daily ed. Nov. 5, 1991).

According to members of Congress, President Bush, too, insisted on a separate vote on § 402(b). *See* 137 Cong. Rec. H9506 (daily ed. Nov. 7, 1991) (Rep. McDermott) ("[T]he Rules Committee was forced to adopt a closed rule, because the White House said the bill will be vetoed if this *Wards Cove* exemption is removed."); H9511 (daily ed. Nov. 7, 1991) (Rep. Walker) ("I have heard the President would veto this bill unless this exemption for *Wards Cove* is included.")

been unintelligible if § 402(a) already made the entire Act inapplicable to pre-existing claims.

The congressional intent behind § 101 in particular also belies any conclusion that Congress intended the Act to apply only to post-Act cases. There was complete unanimity from the outset of the legislative process in 1989 that the *Patterson* decision improperly narrowed the law and should be repudiated.[21] An important part of Congress' motivation from the outset of the entire legislative process was to stop dismissals of § 1981 claims under *Patterson*.[22] Even the Bush Administration, whose legislative proposal also rejected *Patterson*, expressed dissatisfaction with "the cases applying *Patterson* over the past eight months."[23] Many of the dismissals which Congress and the President cited as improper were in cases in which Title VII claims were also pending — as they are in this case — but afforded no jury right and lesser remedies.[24] Application of § 101 to

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[21] *See infra* note 36.

[22] *See* S. Rep. No. 101-315, 101st Cong., 2d Sess., at 13 (1990) (referring to more than 200 race discrimination claims dismissed under *Patterson*).

Senator Hatch announced, after Brenda Patterson testified in Congress, that the bill "would *take care of* Brenda Patterson. We are prepared to do that right now. We are for overruling the Patterson versus McLean case." Cong. Rec. S 16465 (daily ed. Oct. 24, 1990) (emphasis added). If § 101 applied prospectively only, it could not "take care of" a plaintiff in a pending case, as Senator Hatch promised this legislation would.

[23] CIVIL RIGHTS ACT OF 1990: HEARINGS ON S 2104 BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, 101st Cong., 1st Sess., at 111 (1990) (statement of Donald B. Ayer, Deputy Attorney General).

[24] *See* S. Rep. No. 101-315, 101st Cong., 2d Sess., at 13 (1990).

afford Rivers and Davison a jury trial and damages on each of their discrimination claims is consistent with the legislative purpose behind the enactment of that section.

2. No "Manifest Injustice" to Roadway Results from Applying § 101

There is no risk of "manifest injustice" from application of the Act to Rivers' and Davison's claims. Manifest injustice under *Bradley* is determined by "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. No manifest injustice results from application of the 1991 Act here.

The central distinction made by the Court in *Bradley* regarding the "nature and identity of the parties" is between "mere private cases between individuals," in which application of a new law to pre-existing claims may be inappropriate, and litigation involving matters of "great national concern," where application of a new statute is presumed. 416 U.S. at 718-19.[25] Civil rights cases clearly fall within this latter category. The Reconstruction-era civil

[25] *Bradley* specifically identified school desegregation and Title II litigation as examples of matters of national concern. In Title II litigation, although the parties are not governmental actors, a private plaintiff functions as "a private attorney general, vindicating a policy that Congress considered of the highest priority." 416 U.S. at 719. The Court has repeatedly characterized eradication of employment discrimination as of similarly vital public importance. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court observed that there was "an equally strong public interest" in implementation of Title II and Title VII, *id.* at 415, and emphasized that enforcement of federal law against employment discrimination served the "[i]mportant national goals" of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 417-21.

rights laws, including § 1981, were enacted to eliminate "the badges and the incidents of slavery,"[26] thereby addressing matters of as great a public concern as the United States courts have ever been called upon to adjudicate. The application of the Civil Rights Act of 1991 to these parties vindicates the important public purpose of preventing racial discrimination.

The second factor relevant to whether application of the statute would be unjust under *Bradley* is the nature of the rights at stake. This factor is primarily concerned with protecting accrued causes of action of *plaintiffs*:

> The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional.

Bradley, 416 U.S. at 720. *See Gulf Offshore Co.*, 453 U.S. at 486 n. 16 (holding that the "manifest injustice" exception does not apply where "the change does not extinguish a cause of action but merely requires a retrial").

No matured rights of Roadway are implicated by application here of § 101. At the time the alleged discrimination took place, discrimination in any aspect of employment was illegal under both Title VII and § 1981. Furthermore, as to § 1981, this was clearly Roadway's understanding.[27] The law in the Sixth Circuit was clear that

[26] *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 440 (1968).

[27] Prior to this Court's *Patterson* decision, the only legal basis upon which Roadway had contended that plaintiffs' § 1981 claims were not viable was its contention in the Supplement to Defendant Roadway Express Inc.'s Answer to Plaintiffs' First Amended

(continued...)

§ 1981 was available to remedy retaliatory and discriminatory discharge.[28] This Court had repeatedly assumed as much,[29] and the district court had sustained plaintiffs' § 1981 claims before this Court decided *Patterson*. J.A. 7a.

By having plaintiffs' § 1981 claims dismissed under *Patterson* in a case in which parallel Title VII claims were still pending, Roadway enjoyed a reprieve from facing a jury on plaintiffs' discrimination claims, and from the risk of having to pay damages beyond backpay. Given the pendency of the appeal, however, that reprieve cannot have generated any matured right that would be manifestly unjust to disturb. As this Court explained in *Freeborn v. Smith*, 69 U.S. 160 (1865):

> [I]t is hard to perceive what vested right the defendant in error had .... If either party could be said to have a vested right, it was

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[27](...continued)
Complaint that "section 1981 does not confer a private right of action for plaintiffs in this case." Indeed, Roadway conceded below, in characterizing the claims after *Patterson* as "*no longer* viable under § 1981," (emphasis added), that such claims previously were viable. Brief of Appellee, at 18.

[28] *See generally Cooper v. City of North Olmstead*, 795 F.2d 1265, 1270 (6th Cir. 1986) (holding that discriminatory discharge is actionable under § 1981, n.3); *Leonard v. City of Frankfort Elec. & Water Plant*, 752 F.2d 189, 195 (6th Cir. 1985) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268 (6th Cir. 1977) (holding that retaliatory discharge is actionable under § 1981).

[29] Several Supreme Court cases assumed the viability of discharge and retaliation claims. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *St. Francis College v. Al Khazraji*, 481 U.S. 604 (1987); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 275 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975).

> [the] plaintiff ..., who had legally brought his case to this court for review, and whose remedy had been suspended by an accident or circumstance, over which he had no control. If the judgment below was erroneous, ... the defendant is only claiming a vested right in a wrong judgment. "The truth is ... there is no such thing as a vested right to do wrong ...."

69 U.S. at 175 (citation omitted). Because the district court erred in dismissing even the narrowed claims under *Patterson*, the § 1981 retaliation claim has been remanded for a jury trial independent of application of § 101. Under *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, moreover, if plaintiffs prove discrimination before the jury, the court will make new factual determinations and enter a new judgment on the Title VII claims consistent with the jury's findings.[30] To apply § 101 on remand to require that all of plaintiffs' discrimination claims be tried before the jury as opposed to the judge would therefore impair no matured rights. There is, of course, no matured right in a wrong judgment, such as the judgment of the district court in dismissing all § 1981 claims under an erroneous application of *Patterson*.

The third consideration relating to whether application of the Act would produce a "manifest injustice" is the impact of the change in the law. This factor concerns "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720. Because the cause of action under § 101 merely restores to plaintiffs their pre-*Patterson* § 1981 remedy for discrimination that has been

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[30] Roadway conceded below that, if the appeals court determined the § 1981 dismissal was in error, which it has since done, the Title VII judgment could not be left in place and estop the § 1981 litigation. Supplemental Brief of Appellee, at 48.

consistently illegal under Title VII, defendants cannot identify any "new and unanticipated obligations." Roadway was on notice when the challenged conduct occurred that discriminatory discharge of employees was illegal, and such conduct has consistently remained illegal at all relevant times.[31] This application of *Bradley* comports with the implication of *Bennett v. New Jersey*, 470 U.S. at 639-40, that *Bradley* does not require retrospective application of statutes that create new substantive liabilities. *See infra*, Point II.C., at 41-42. No new substantive liability is created by applying § 101 to allow a jury trial and damages on all claims on remand.

B. *Bradley's* Operation In This Case Is Consistent With Prior Law

For two centuries, application of new statutes to pre-existing claims has been a routine matter of statutory construction. Long before the decision in *Bradley*, this Court consistently recognized that, unless Congress expressly directed otherwise, statutes like § 101 presumptively applied to pre-existing claims. Two characteristics of § 101 make it presumptively applicable: (1) the changes it makes are remedial and procedural, and (2) it is restorative of the law as the parties and Congress previously interpreted it. Where a law enacts new remedies and procedures to enforce an existing right, the Court has long presumed that the new law applies to pre-existing claims. And where legislation restores a legal rule or standard that the parties knew governed their conduct when that conduct took place, such restorative legislation has also been presumed to apply to pre-existing claims. These two categories are consistent with the *Bradley* presumption and its manifest injustice exception; remedial

[31] Roadway itself asserted in the Court of Appeals that "there is no dispute that Appellants' claims, however characterized, were actionable under Title VII ...." Brief of Appellee, at 16.

and restorative laws are two common types of laws which, when applied to pending cases, do not create manifest injustice.

A new law which is *either* procedural *or* restorative presumptively applies in a pending case. Thus, even if the Court concluded that § 101 is not procedural and remedial, but substantive, the restorative nature of § 101 is an independent basis requiring its application here under this Court's settled law. And, similarly, even a non-restorative provision applies if the provision is merely procedural or remedial.

Other categories of new laws have for many years been presumed to be *in*applicable to pre-existing claims, and they coincide with the manifest injustice exception under *Bradley*: laws which revoke vested rights, and those which render illegal conduct that was legal when engaged in. This Court has consistently held that statutes which would vitiate a "vested right" or a matured cause of action if they were applied to pre-existing claims do not so apply.[32] The Court has also held that statutes altering established substantive rules of conduct on which parties had relied to their

[32] *E.g.*, *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806) (holding that vested right to compensation for past services at rate pertaining when services rendered cannot be disturbed by application of new statute lowering compensation rate); *id.* at 413 (Paterson, J.) (referring to presumption against construction that would "interfere with ... antecedent rights, services, and remuneration"); *id.* at 414 (Cushing, J.) (referring to presumption against construction that would "devest vested rights"), *id.* at 411 (Washington, J.) (referring to "expectation" of collectors); *Twenty Per Cent Cases*, 87 U.S. 179, 187-88 (1874) (holding, where raise in salary that was in effect when the work to be compensated was done was subsequently repealed, that the repeal would interfere with vested rights and should be construed so as not to apply).

detriment should not be applied to pre-existing claims.[33] The most common example of such reliance occurs where new legislation renders illegal conduct that was previously lawful. *See generally* Point II.C., *infra*.

1. Section 101 Applies Because it Affords Additional Remedies and Procedures

Because § 101 aids enforcement of anti-discrimination law by adding procedures and remedies, and does not substantively expand the types of race discrimination that federal law prohibits, this Court's cases during the last two centuries mandate that § 101 apply here. Section 101 would effect a remedial change here because it would enhance the available remedies for retaliation and for discriminatory discharge—conduct which has at all relevant times been illegal and subject to equitable relief under Title

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[33] *Lewellyn v. Frick*, 268 U.S. 238 (1925), referred to

> the general principle "that laws are not to be considered as applying to cases which arose before their passage" is preserved, *when* to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways.

268 U.S. at 252 (emphasis added). Similarly, in *Blodgett v. Holden*, 275 U.S. 142 (1927), the Court refused to apply a new tax to gifts given prior to its enactment, commenting:

> It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

275 U.S. at 147; see also *id*. at 149 (Holmes, J., concurring) (quoting *Lewellyn*).

VII. Section 101 merely provides an opportunity to recover damages for such conduct, and in this case an opportunity for a § 1981 jury trial on plaintiffs' discriminatory discharge claims. Thus, § 101 merely adds remedies and procedures for substantive wrongs already recognized.

Section 101 is therefore applicable under this Court's established law favoring application to pre-existing claims of new remedies to enforce established rights. Justice Holmes rightly observed that when Congress amends remedies, "it evinces a change of policy, and an opinion that the rights ... can be better preserved by "the [new remedial scheme.] The consideration applies with the same force to all cases...." *Howell v. Commons*, 239 U.S. 506, 508 (1916). Where Congress concludes that an existing remedial scheme is defective, and creates what it believes to be a fairer and more effective method of enforcement, that congressional judgment extends to all cases, whether they arose before or after the new law. Having made such a judgment, it would be surprising indeed if Congress chose to leave in effect for any category of cases the discarded remedial scheme which it had found inadequate.

The Court has consistently applied to pending cases statutes that alter the remedies available in civil litigation. In *Sampeyreac v. United States*, 32 U.S. 222 (1833), for example, the Court noted that

> Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.... It therefore forms no objection to the [particular statute in question] that the cause of action existed antecedent to its passage, so

> far as it applies to the remedy, and does not affect the right.

32 U.S. at 239-240.[34]

The court below erroneously concluded that the 1991 Act makes a substantive — rather than remedial and procedural — change in the law in part because the court considered the 1991 Act as a whole, rather than examining the specific impact of applying § 101 in this case. P.A. 14a. But plaintiffs are not asking the Court to apply all of the 1991 Act's provisions here; they ask only that § 101 be applied. The Court in *Bradley* itself properly looked only at § 718 of the 1972 Emergency School Aid Act. 416 U.S. at 709. The 1991 Act in its entirety, like the 1972 Act at issue in *Bradley* and many other federal laws, is long and complex. The *Bradley* rule would be entirely unworkable if it required courts in each case to sift through dozens or perhaps hundreds of pages of statutory provisions to determine whether any of them are substantive before they can address the provision sought to be applied.

Under the Court of Appeals' analysis, this Court's doctrine on application of remedial and procedural changes would be all but abolished. The existence of any substantive provision in a statute would by definition bar application of other, wholly remedial or procedural provisions to pending cases. The proper application here of *Bradley*'s distinction between substantive and non-substantive changes in law

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[34] The Court has repeatedly applied to pending litigation new laws authorizing federal courts to hear claims the merits of which were actionable, in some other forum, prior to the new laws. *See e.g.*, *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 607-08 n. 6 (1978); *Watts, Watts & Co. v. Unione Austriaca*, 248 U.S. 9 (1918); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916); *Freeborn v. Smith*, 69 U.S. 160 (1865).

> requires examination of § 101 alone within the factual and procedural context of this case.

2. Section 101 Applies Because It Is Restorative

Section 101 should also be applied to pending cases because it repudiated what Congress viewed as this Court's too-restrictive interpretation of § 1981. The statute thereby returned the § 1981 standard to what the lower courts and the parties understood it to be when the conduct challenged in this case took place. When plaintiffs were fired in 1986, jury trials and damages were generally understood had been authorized under § 1981. Congress sought to restore what it and virtually all the lower courts thought had been the reach of § 1981 prior to *Patterson*.

The Supreme Court on a number of occasions has rejected arguments that vested rights are injured by legislation which was intended to restore formerly prevailing law or legal status. This principle was applied over a century before *Bradley* and *Bonjorno* in *Frisbie v. Whitney*, 76 U.S. 187 (1870). Frisbie, like many others similarly situated, had purchased and settled on land in an area of California "supposed by almost every one in that country to be private property." *Id.* at 188. A subsequent judicial decision, however, held that the land in question was actually the property of the United States, causing "a rush" of outsiders to file claims on the land under then-existing law authorizing homesteading on government land. Within a few months of the judicial decision, however, a "magnanimous" Congress adopted new legislation giving previous occupants such as Frisbie an opportunity to purchase at nominal cost the farms they had built and cultivated. The Supreme Court

unanimously rejected the claim of a subsequent homesteader that the new legislation violated his vested rights. *Id.* at 193-96.[35]

Because the parties in this case understood the governing law at the time of the underlying conduct to be the same in all respects — procedural, remedial and substantive — as the law which has been restored under § 101, no vested rights or expectations are at risk. *See supra* Point II. A.2. at 28-30. When the discrimination against Rivers and Davison took place, § 1981 was generally considered to apply to claims of discriminatory discharge. *See id.* Defendant Roadway never relied on the *Patterson* decision or any similar construction of § 1981 in personnel decisions with respect to Rivers and Davison, and the Company never asserted before *Patterson* that retaliation or discharge was not covered by § 1981. Section 101 should thus be applied here because it describes the law as the parties understood it when the challenged conduct occurred.

In determining whether a law is restorative, the Court also looks to the understanding of Congress regarding prior law. Laws enacted for the purpose of "correcting" judicial interpretations of statutes and restoring prior law should be applied to pending claims in order to give full effect to their restorative purpose. This result follows from the rule that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-81 and n.8 (1969). Thus, when Congress enacts legislation

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[35] *See also Cox v. Hart*, 260 U.S. 427 (1922) (holding vested rights not violated by statute restoring preference to claimant to public land who had settled there "when the law conferred a right to do so"); *Freeborn v. Smith*, 69 U.S. 160 (1865) (holding vested right not violated by new statute restoring an appeal right to an appellant whose appeal had been extinguished when Nevada changed from a territory to a state).

expressly designed to correct what it deems to have been an erroneous interpretation of statutory language, it would defeat the deference required by *Red Lion* to decline to apply the statute to pending cases in order to give effect to its restorative function.

If restorative legislation were applied only prospectively, for numerous litigants the law would not be "restored" at all. Where Congress considered the disapproved decision a mistaken departure from prior precedents, as it so clearly did with respect to *Patterson*, it may be presumed that Congress did not intend forever to disadvantage litigants who had the misfortune of having pending cases while the error was temporarily in effect. As the Ninth Circuit explained in *Estate of Reynolds v. Martin*, 985 F.2d at 475, "Congress' expressed desire to undo the effects of recent Supreme Court decisions, and to restore civil rights law to its previous state, reinforces our belief that Congress intended the courts to apply the Act to cases presently before them." A statute adopted for the express purpose of restoring prior law cannot plausibly be understood to codify for all pre-existing but unresolved claims the very decision which Congress disapproved.

The presumption in favor of application of restorative statutes does not depend on whether *Patterson* was actually wrongly decided. It does not matter whether the parties were "correct" in their pre-*Patterson* legal assumptions that § 1981 covered all forms of discharge and retaliation. Rather, the point is that those were their assumptions. The parties' understanding at the time is no less salient to the analysis here simply because the Court subsequently reached a different conclusion. If Roadway shared in the commonly held assumption, reasonable in view of case law at the time, that § 1981 prohibited race discrimination in all aspects of employment, it cannot now be heard to protest that application of § 101 produces unexpected and thus manifestly unjust effects.

It similarly does not matter whether Congress was actually "correct" in its view of the original version of § 1981. What matters is that Congress believed *Patterson* was a misinterpretation of the original statute, and that its purpose in enacting § 101 was to reiterate what it took to be the meaning and intent of the original statute. The issue is not what the original statute actually meant, but what Congress in 1991 thought (however mistakenly in the Court's view) the statute meant, and whether Congress thus believed the 1991 Act merely codified the intent of the earlier law. The legislative history on this precise point overwhelmingly supports the conclusion that Congress believed that *Patterson* was wrongly decided and therefore sought to restore § 1981 by legislatively overruling *Patterson*.[36] The structure of

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[36] Both in 1990 and in 1991, there was unanimity on this point, and even the strongest opponents of the overall legislation — in Congress and in the Bush Administration — agreed that *Patterson* created an unintended and unacceptable restriction of § 1981 rights. In an April 3, 1990 letter from Attorney General Thornburgh to Senator Kennedy, the Bush Administration vigorously opposed most of the 1990 bill Senator Kennedy and others had introduced, but it supported overruling *Patterson* because "[w]e believe that the law as interpreted in *Patterson* leaves a significant gap in Section 1981 coverage that should be filled." (Letter from Attorney General Dick Thornburgh to Senator Edward M. Kennedy, April 3, 1990, p. 11).

The June 8, 1990 Report of the Senate Committee on Labor and Human Resources on the Civil Rights Act of 1990 devoted an entire section to "The Need to Restore the Protection Against All Racial Discrimination in the Making and Enforcement of Contracts," stating that *Patterson* "sharply cut back on the scope and effectiveness of Section 1981." S. Rep. No. 315, 101st Cong., 2d Sess. 12 (1990). The Report also included a statement of minority views of Senators Hatch, Thurmond and Coats, with just one sentence regarding *Patterson*: "The *Lorance* and *Patterson* decisions do merit reversal." *Id.* at 65. The House reports in 1990 contained similar statements. *See* H.R. Rep. No. 644 Part 2, 101st Cong., 2d Sess. 9, 70 (1990) (Committee on the Judiciary) and H. R. Rep. No. 644 Part 1, 101st (continued...)

§ 101, which is presented as an interpretation of the phrase "make and enforce contracts" from the original version of § 1981, rather than as a re-wording of the original statutory phrase, comports with the legislative history. Because § 101 is restorative both with respect to the legal consequences Roadway anticipated when it discharged Rivers and Davison, and with respect to what Congress thought it was accomplishing in enacting § 101, established law requires its application here.

C. This Court's "Retroactivity" Decisions Since *Bradley* Are Consistent With That Decision and Support Application of § 101 Here

The Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), while consistent with the principles articulated above, is not applicable here. *Bowen* announces a presumption against "retroactivity" for laws that change substantive rights, while *Bradley* establishes an opposite presumption for procedural, remedial and restorative measures. In *Bonjorno*, 494 U.S. 827, the Court ruled that the presumption articulated in *Bradley* was "[i]n

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[36](...continued)
Cong., 2d Sess. 18, 113 (1990) (Committee on Education and Labor).

On July 17, 1990, Senator Kennedy said in floor debates, "Now, we put the law back to what it was prior to *Patterson* in our substitute. The Bush Administration has also adopted virtually similar language in their own proposal, to overturn *Patterson*." 136 Cong. Rec. S 9848 (daily ed. July 17, 1990). The terms of the discussion were the same in 1991. Senator Durenberger pointed out that the 1991 Act overturned *Patterson* and *Lorance* and that "[a]ll interested parties, including the Administration, civil rights groups and business groups, agree that these two cases incorrectly narrowed the protections available to minorities." 137 Cong. Rec. 102d Cong., 1st Sess., S 7026 (daily ed. June 4, 1991).

apparent tension" with language in *Bowen*, but concluded that it did not need to "reconcile the two lines of precedent" because the case was decided based on the plain language of the statute. *Id.* at 837.[37] What may appear to be a conflict when the issue is framed as whether new statutes in general apply "retroactively" disappears on closer analysis of the nature of the legal changes at issue. The recent holdings of this Court carry forward the basic principles of *Bradley* and the pre-*Bradley* cases: new laws that impair vested rights or retrospectively change standards of conduct are "retroactive" in the technical legal sense used in *Bowen* and thus do not apply in pending cases, whereas other new laws, including remedial, procedural and restorative provisions, are not in the category of "retroactive" applications which *Bowen* condemns, and they do apply.[38]

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[37] Justice Scalia argued in a separate concurring opinion, which no other member of the Court joined, that *Bradley* was "in irreconcilable contradiction" with the line of cases regarding "retroactivity" and should be overruled. 494 U.S. at 841. Eight justices rejected that characterization of *Bowen* and *Bradley*. Four members of the Court, dissenting as to the meaning of the language of the statute at issue, insisted that *Bowen* and *Bradley* were entirely consistent, *id.* at 864-65; the majority opinion described any tension between the precedent as merely "apparent." *Id.* at 837.

[38] The United States is the party which argues most frequently in the federal courts that new statutes should apply to pending cases, and in so doing the Government frequently relies on *Bradley*. *See* Appendix A hereto (listing cases in which the United States has relied upon, or stood to benefit from, application of the *Bradley* presumption). A holding by this Court that *Bowen* or *Bonjorno* have limited or overruled *Bradley* might seriously jeopardize the government's enforcement efforts in areas far beyond civil rights. The agencies recently invoking the *Bradley* presumption include the Immigration and Naturalization Service and Criminal and Civil Divisions of the Department of Justice, the Department of Labor, the Environmental Protection Agency, Federal Deposit Insurance Corporation, Resolution Trust Corporation, Department of Health and Human Services, and many others. *Id.*

In *Bowen*, the Court construed rule-making authority of the Secretary of Health and Human Services not to include authority to adopt a "retroactive cost-limit rule," which would have permitted the United States to recoup fees already paid to the Hospital under prior reimbursement standards. In so holding, the Court commented:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

488 U.S. at 208. The agency rule that *Bowen* identified as impermissibly "retroactive" would have deprived New Jersey of funds to which it was contractually entitled.

Bowen thus presented a classic problem of applying a new rule to conduct performed in reliance on existing legal standards. The hospitals had provided the medical services based on the government's representation that the hospitals would be reimbursed at rates that were fixed by the then controlling reimbursement schedules. When those rates were lowered two years later, their retroactive application would have required the State to repay over $2 million for services already rendered under the old schedule. Thus, to apply the new rule to the State's claims would have been "manifestly unjust" under *Bradley*.

Bonjorno's suggestion that *Bowen* and *Bradley* are reconcilable — but simply did not need to be reconciled in that case, *see* 494 U.S. at 837 — is consistent with the Court's earlier post-*Bradley* decisions. In *Bennett v. New Jersey*, 470 U.S. 632 (1985), for example, the Court explained that the presumption against "retroactivity" was a presumption regarding statutes affecting substantive rights and obligations:

Bradley held that a statutory provision for attorney's fees applied retroactively to a fee request that was pending when the statute was enacted. This holding rested on the general principle that a court must apply the law in effect at the time of its decision, which *Bradley* concluded holds true even if the intervening law does not expressly state that it applies to pending cases. *Bradley*, however, expressly acknowledged limits on this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." This limitation *comports with* another venerable rule of statutory interpretation, *i.e.* that statutes affecting substantive rights and liabilities are presumed to have only prospective effect. *See, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Greene v. United States*, 376 U.S. 149, 160 (1964). *Cf. Bradley*, [416 U.S.] at 725 (noting that statutory change did not affect substantive obligations).

470 U.S. at 639-40 (emphasis added) (citations omitted).

The Court in *Bennett* held that the statute at issue in that case was "presumptively" inapplicable to existing claims because the statute had altered standards of conduct on which the parties had earlier relied. The majority emphasized the need for fixed standards on which officials granting Title I funds and those receiving them could rely. 470 U.S. at 640. *Bennett* suggests the *Bradley* line of decisions "comports with" the decisions referred to in *Bowen* because the circumstances expressly excepted from the *Bradley* presumption — statutes which would affect vested

rights or standards on which parties would have relied — are precisely the circumstances to which the *Bowen* presumption applies.

Thus, the *Bowen* presumption applies where application of a new law to a pre-existing claim would be "manifestly unjust" within the meaning of *Bradley*, and is fully consistent with that case. Because § 101 affects no vested rights and effects no substantive change, but merely restores remedies and procedures available when this case began, the *Bradley* presumption applies here. Within the meaning of *Bowen*, application of § 101 in this case is not a "retroactive" application at all.

Similarly, the Court viewed the post-judgment interest statute at issue in *Bonjorno*, which applied to all appeals taken from judgments entered after the effective date of the statute, October 1, 1982, as prospective. The Court so characterized it despite the fact that, for years after that effective date, most such appeals would occur in cases that were filed before, and arose out of conduct occurring before, October 1982. Application of the new interest rate to a November 1982 judgment, although necessarily involving a pre-Act claim, was characterized as *not retroactive*, because it was only on the date of judgment that the losing party, in deciding whether to pay the judgment or appeal, would have relied on the potential interest cost of further disputing that award.[39] As Justice Thomas recently

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[39] *See Bonjorno*, 494 U.S. at 839:

> [O]n the date of judgment expectations with respect to interest liability were fixed, so that the parties could make informed decisions about the cost and potential benefits of paying the judgments or seeking appeal.

(continued...)

explained, "not every application of a new statute to a pending case will produce a 'retroactive effect.'" *Republic National Bank v. United States*, ____ U.S. ____, 121 L. Ed. 2d 474, 492 (1992) (opinion of Thomas, J., concurring). Where, as here, a new statute affects only the procedures to be applied and the remedies to be awarded, its application to a pending case has no "retroactive" effect. In contrast, where a new law changes the substantive rules governing conduct, or eradicates vested rights, it is properly said to be truly retroactive within the technical legal meaning of that term as used in *Bowen*. Application of § 101 to the further proceedings that will in any event occur in this case has no "retroactive effect," because it merely means that a jury trial and damages will be available on all the discrimination claims. The non-retroactive effect of applying § 101 here is also clear because both a jury and damages were thought to be available when this case began.

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[39](...continued)
Justice Scalia denounced "retroactive" applications, but characterized as "prospective" the application of the new interest rate to any judgment entered after October 1, 1982 without regard to when the original violation occurred. *Id.* at 841.

CONCLUSION

The judgment of the Court of Appeals should be reversed insofar as it held that the unamended version of § 1981, and not the statute as amended by § 101 of the 1991 Civil Rights Act, governs the trial of plaintiffs' employment discrimination claims on remand to the district court.

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APPENDIX

APPENDIX A

Appellate Cases in Which the United States Has Sought to Apply a New Statute to a Pre-Existing Claim

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This list includes reported appellate decisions in which a court's opinion considered possible application of a new statute to a pre-existing claim and in which the party that would have benefitted from that application was an agency of the United States government. Because it was not feasible to examine the actual briefs in those cases, it is possible there may be a few instances in which the argument was raised by the court sua sponte, and was never briefed by the United States. Conversely, there are may be instances in which the United States sought such an application but they are not on this list, either because the reported opinion did not discuss the issue or because the opinion was not officially reported. Except as noted, the court decided to apply the new statute to the claim at issue.

Department of Justice - Criminal Cases

Turner v. United States, 410 F.2d 837, 842-43 (5th Cir. 1969) (1967 amendment to Universal Military Training and Service Act).

United States v. Haughton, 413 F.2d 736, 738 (9th Cir. 1969) (1967 amendment to Universal Military Training and Service Act).

United States v. Vanella, 619 F.2d 384, 385-86 (5th Cir. 1980) (amendment to Speedy Trial Act).

United States v. Fernandez-Toledo, 749 F.2d 703 (11th Cir. 1985) (amendment to Bail Act) (application denied).

Nilson Van & Storage Co. v. Marsh, 755 F.2d 362, 364-66 (4th Cir. 1985) (Comprehensive Crime Control Act of 1984).

United States v. Angiulo, 755 F.2d 969, 970-74 (1st Cir. 1985) (Bail Reform Act of 1984).

United States v. Zannino, 761 F.2d 52 (1st Cir. 1985) (Bail Reform Act of 1984).

United States v. Affleck, 765 F.2d 944 (10th Cir. 1985) (Bail Reform Act of 1984)

United States v. Miller, 830 F.2d 1073, 1075-76 (9th Cir. 1987) (Comprehensive Crime Control Act of 1984).

United States v. Wright, 873 F.2d 437, 443-44 (1st Cir. 1989) (amendment to statute regarding sentencing guidelines).

Commonwealth of Northern Mariani Islands v. Mendiola, 976 F.2d 475 (9th Cir. 1972)

Department of Justice - General Civil Litigation

Beatty v. United States, 191 F.2d 317, 320 (8th Cir. 1951) (1949 amendment to Housing and Rent Act).

United States v. Alabama, 362 U.S. 602 (1960) (1960 Civil Rights Act).

United States v. Village Corp., 298 F.2d 816 (4th Cir. 1962) (Virginia law extending statute of limitations).

United States v. Hinds County School Bd., 560 F.2d 619, 622-23 (5th Cir. 1977) (1972 Equal Educational Opportunity Act).

United States v. State of North Carolina, 587 F.2d 625, 626 (4th Cir. 1978) (executive branch reorganization approved by Congress).

United States v. Fresno Unified School Dist., 592 F.2d 1088, 1093-94 (9th Cir. 1979) (executive branch reorganization approved by Congress).

United States v. Commonwealth of Virginia, 620 F.2d 1018, 1022 (4th Cir. 1980) (executive branch reorganization approved by Congress).

United States v. Elrod, 627 F.2d 813, 819 (7th Cir. 1980) (Civil Rights of Institutionalized Persons Act).

Ruiz v. Estelle, 679 F.2d 1115, 1134-36 (5th Cir. 1982) (Civil Rights of Institutionalized Persons Act).

United States v. Marengo County Comm'n, 731 F.2d 1546, 1552-55 (11th Cir. 1984) (1982 amendments to Voting Rights Act).

United States v. Dallas County Comm'n, 739 F.2d 1529, 1534 (11th Cir. 1984) (1982 amendment to Voting Rights Act).

United States v. 6.93 Acres of Land, 852 F.2d 633 (1st Cir. 1988) (amendment to Equal Access Justice Act).

Ayers v. Allain, 893 F.2d 732, 754-56 (5th Cir. 1990) (Civil Rights Restoration Act)

United States v. Peppertree Apartments, 942 F.2d 1555, 1560-61 (11th Cir. 1991) (amendments to National Housing Act).

Department of Justice - Immigration and Naturalization Service

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(13)

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No. 92-938

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Section 101 of the Civil Rights Act of 1991 applies to claims arising from conduct which occurred and which was adjudicated to be non-discriminatory prior to the date on which Section 101 became law.

PARENTS AND SUBSIDIARIES

In accordance with Rule 29.1 of the Rules of the Court, respondent included its list of parent companies and subsidiaries in its Brief in Opposition to Petition for Writ of Certiorari, at ii.

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IN THE

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MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

STATUTES INVOLVED

The statute involved in this case is the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. It is reprinted in Appendix B of the brief of petitioner in No. 92-757, and is excerpted in the brief of petitioners.

STATEMENT OF THE CASE

1. Petitioners Maurice Rivers and Robert C. Davison are black garage mechanics who previously were employed by respondent Roadway Express, Inc. (Pet. App. 2a). In August 1986, garage supervisors of respondent scheduled disciplinary hearings for petitioners based on their accumulated work records, including problems of absenteeism, poor workmanship, and insubordination (*id.*; Guy Dep. at 158-60 & Exs. 47, 48 (Aug. 12, 1987)). After petitioners were notified of the hearings but failed to attend, they were suspended for two days (Opp. App.

A4-A5). Petitioners filed grievances, claiming that they had not received proper notice of the hearings, and were awarded back pay (*id.* at A5-A6).

A garage manager of respondent then scheduled new disciplinary hearings during working hours for petitioners and some white mechanics (Opp. App. A6-A8). Petitioners and one white mechanic refused to attend (*id.* at A7-A10). As a result, on September 26, 1986, petitioners and the white mechanic were discharged "for refusing several direct orders to attend the hearings and for [their] accumulated work record[s]" (Pet. App. 3a).

2. On December 22, 1986, petitioners, along with another discharged mechanic, James T. Harvis, Jr. (collectively, "plaintiffs"), filed a complaint in district court against respondent and their union local (R.1). The complaint alleged that respondent had violated 42 U.S.C. Section 1981 and the governing collective bargaining agreement by discharging plaintiffs because of their race and without just cause (R.1 at 1-5). The complaint further alleged that the union had violated its duty of fair representation in processing plaintiffs' grievances (*id.* at 1, 4-5). On October 18, 1988, plaintiffs amended their complaint, adding discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (J.A. 15a-20a; *see* Opp. App. A3).

On November 30, 1988, the district court granted summary judgment against the plaintiffs on their breach of collective bargaining agreement and duty of fair representation claims, finding that, "[d]espite [the] extensive record" in the case, "plaintiffs have failed to present any evidence of arbitrariness, discrimination or bad faith in the processing of their grievances" (J.A. 29a). Subsequently, the court separately submitted plaintiff Harvis' Section 1981 discharge claim to a jury, which, on June 13, 1989, returned a verdict in favor of respondent and against Harvis (Pet. App. 20a).

On July 10, 1989, the district court issued an Order directing petitioners to show cause why this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), did not require dismissal of their Section 1981 claims (Pet. App. 19a). On January 19, 1990, the court dismissed those claims (*id.* at 24a). The court then held a bench trial on petitioners' Title VII retaliation and discharge claims and, on October 18, 1990, entered judgment for respondent, finding that "black employees were not treated differently than white employees with respect to the scheduling of disciplinary hearings," and that petitioners were discharged "for refusing direct orders and for [their] accumulated work record[s]" and "not . . . because of [their] race" (Opp. App. A6, A9, A10, A13).

3. On November 21, 1991, while petitioners' appeals were pending, Congress passed the Civil Rights Act of 1991 ("the Act" or "CRA"), Pub. L. No. 102-166, 105 Stat. 1071 (1991). Among other provisions, the CRA amended Title VII, Section 1981, the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* In particular, Section 101(b) of the Act expanded Section 1981 to cover "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 105 Stat. 1072.

4. Eight months later, on August 24, 1992, the court of appeals affirmed in part, reversed in part, and remanded for further proceedings on petitioners' retaliation claims (Pet. App. 2a). The court first held that, under *Patterson*, the district court had properly dismissed petitioners' race discrimination in discharge claims (*id.* at 2a, 4a-6a). The court next held that petitioners' retaliation claims survived *Patterson* and that relitigation of these retaliation claims is not precluded by the district court's

prior Title VII judgment (*id.* at 2a, 6a-10a). Finally, the court rejected petitioners' argument that the Act should be applied retroactively to their Section 1981 claims, reasoning that "retroactive application of the 1991 Act would affect 'substantive rights and liabilities of the parties' " (Pet. App. 13a (quoting *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992)). Accordingly, the court remanded for further proceedings only on petitioners' "§ 1981 claims based on retaliation for attempting to enforce contract rights" (Pet. App. 14a).[1]

SUMMARY OF ARGUMENT

I. The principle that legislation looks forwards, not backwards, and its corollary that retroactivity is not favored in the law, are deeply rooted in this nation's most basic concepts of justice and limited government through checks and balances. It is a basic concept of justice that citizens should have fair warning of the law and its sanctions so that they can avoid these sanctions if they wish. It is also a basic concept of limited government through checks and balances that the power retroactively to identify wrongdoers and impose sanctions is a power more properly exercised in the enforcement of the law than in the course of framing the law. These concepts of justice and limited government through checks and balances are reflected in the rule of construction that this Court has applied for nearly two hundred years in interpreting nonpenal civil statutes—namely, that nonpenal civil statutes will be presumed not to apply to conduct or trials that occurred before the dates of their enactment unless their terms clearly and unequivocally command such a retroactive effect.

[1] Petitioners and the Solicitor General suggest (Pet. Br. 9, 14, 29; U.S. Br. 26 n.15) that the remand of petitioners' retaliation claims reopens the district court's Title VII judgment on their discharge claims as well. But the court of appeals affirmed the district court's disposition of the discriminatory discharge claims, and did not purport to remand on those claims; it remanded only on the retaliation claims (Pet. App. 2a, 4a-7a, 14a).

II. The Civil Rights Act of 1991 does not clearly and unequivocally command such a retroactive effect. The language of Section 402(a) of the Act, which states that "[e]xcept as otherwise specifically provided, the Act and the amendments made by this Act shall take effect upon enactment." 105 Stat. 1099, is facially ambiguous. But Congress had previously passed numerous statutes with the same or similar language, which courts had construed to have only a prospective effect. Congress is presumed to have been aware of this prior judicial interpretation and, by including such language in Section 402(a), to have adopted that interpretation for purposes of this Act.

Construing Section 402(a) to make the Act generally prospective would not, as petitioners and the Solicitor General contend, improperly deprive other effective date provisions in the Act of independent and particular effect. Section 402(a)'s "[e]xcept as otherwise specifically provided" language derives meaning from Section 102 of the Act, by ensuring that the latter section's provisions for damages and jury trials in cases brought under the Americans with Disabilities Act ("ADA") of 1990 would not apply until the ADA's employment provisions themselves became effective—seven months after the CRA's effective date. Likewise, Section 402(a)'s independent and particular effect is to avoid for the Act in general the unambiguous resolution of the prospectivity versus retrospectivity question that Sections 109(c) and 402(b) of the Act unambiguously resolve for the particular statutory sections to which they respectively apply.

III. The alternative argument of petitioners and the Solicitor General that Section 101 should be judicially presumed to apply retroactively is also unsound. As petitioners and the Solicitor General concede, the broadly-stated presumption of retroactivity set forth in this Court's decision in *Bradley v. School Board*, 416 U.S. 696, 711 (1974), does not apply where a law "affect[s] substantive rights and liabilities." *Bennett v. New Jersey*,

470 U.S. 632, 639 (1985). Section 101 is plainly such a law.

A. Contrary to the argument of petitioners and the Solicitor General, Section 101 neither merely creates new remedies and procedures for pre-existing wrongs under Title VII nor merely "restores" Section 1981 to some supposed prior state. Section 101 is a distinct positive law that outlaws much conduct that Title VII does not outlaw; and Section 101 does not lose its substantive content merely because Title VII outlaws some of the same conduct. Likewise, Section 101 is not a law that merely "restores" Section 1981 to a state allegedly intended by the Congress that first enacted it. While factions in Congress favored enacting such a restorative law, the majority did not enact a law that purports to do so—as the statute's language and legislative history make clear.

B. Even if Section 101 could properly be characterized as a remedial, procedural or restorative law, however, it still should be governed by the traditional presumption against retroactive application of statutes. The Court has held that the traditional presumption applies to laws by which human action is regulated. The new substantive rights and correlative remedies that Section 101 creates (and to which a jury trial right implicitly attaches) plainly may constitute such laws.

Application of the traditional presumption to Section 101 furthers the principles of justice and limited government that underlie the presumption of prospectivity. Under these principles, citizens should have notice of the sanctions that may be applied to their conduct, and a fair opportunity to avoid those sanctions. Likewise, citizens should not be judged or punished by later created legislative standards—even those that purport to impose standards that previously existed in the law. In a system of limited government, Congress is presumed ill-suited to create such retrospective damages rules and behavioral standards. While Congress has the power to act retrospectively, the principles of justice and limited government through checks and balances that underlie the presumption of prospectivity require that Congress make clear its intent to do so.

There is no sound jurisprudential or doctrinal reason for ignoring these principles in the context of Section 101. Contrary to petitioners' contention, this Court's case law does not justify exempting remedial, procedural, or restorative statutes from the traditional presumption of prospectivity. Moreover, adoption of a different presumption for laws like Section 101 would not only undermine the basic principles of justice and limited government through checks and balances that underlie the presumption of prospectivity, but it would also needlessly increase the workload of the courts—which would have to start pigeonholing laws as either "substantive," "remedial," "procedural," or "restorative" in order to determine which presumption is applicable—and unnecessarily complicate and confuse the process of interpreting statutes. To the extent that *Bradley* may be read to support such a presumption of retroactivity, the Court should make clear that it no longer states the governing law.

ARGUMENT

The question here is whether Section 101 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-72 (1991), is to be given retroactive application—*i.e.*, whether the rights that Section 101 establishes (and the remedies and jury trial right that implicitly attach to those rights) are to be applied to conduct that occurred, and that was adjudicated to be non-discriminatory, prior to the passage of the Act. The answer to that statutory interpretation question, as with all statutory interpretation questions, must be found in the language and structure of the Act, read against the relevant background legislative materials. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

In this instance, however, that exercise does not take place in a vacuum. This Court has announced that "[i]t is a principle which has always been held sacred in the United States that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable." *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417, 434 (1829) (Marshall, J.). This principle governs this case.

To be sure, petitioners do not accept this principle as the law. Based on *Bradley v. School Board*, 416 U.S. 696 (1974), they argue instead that, where remedial, procedural or restorative laws are concerned, Congress is presumed to have intended that its statutes will be applied retroactively unless manifest injustice would result, or unless there is statutory direction to the contrary.

That being so, we proceed as follows: First, we explore the reasons for and background to the traditional presumption of prospectivity. Then, we address the statutory materials and demonstrate that, under the traditional presumption, Section 101 of the Act may not be applied retroactively. Finally, we demonstrate that, contrary to petitioners' argument, Section 101 is not a mere remedial, procedural or restorative law and that, even if it were, the traditional presumption would apply and would preclude retroactive application of Section 101.

I. A STATUTE SHOULD NOT BE APPLIED TO CONDUCT OR TRIALS OCCURRING BEFORE THE DATE OF ITS ENACTMENT UNLESS ITS TERMS CLEARLY AND UNEQUIVOCALLY COMMAND A RETROACTIVE EFFECT

The principle that legislation "look[s] forwards, not backwards," *Reynolds v. M'Arthur*, 27 U.S. at 434, and its corollary that "[r]etroactivity is not favored in the law," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), are deeply rooted in the most basic concepts

of justice and in the system of limited government through checks and balances that is the particular genius of our constitutional plan. As Justice Story noted, "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." Joseph Story, *Commentaries on the Constitution*, § 1398 (3d ed. 1858).

The justice component of these principles has an ancient lineage. Since the time of the Greeks and Romans, it has been recognized that, "as a matter of justice[,] laws should not be enforced before the subjects have an opportunity to become acquainted with them." Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 777 (1936) (citing 1 William Blackstone, *Commentaries* *46 (1765)). *See also Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 837, 855 (1990) (Scalia, J., concurring). This Court has thus stated that time-honored principles of law require that statutes "give fair notice of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

As Justice Story suggested, however, in American law, the principle that conduct should be judged under the law that existed when the conduct took place is not based solely on concepts of justice. It is also based on a principle of limited government through checks and balances—specifically, the principle that the retrospective identification of wrongdoers and imposition of punishment is a power more properly exercised in the enforcement of the law than in the course of framing the law. *See Dash v. Van Kleeck*, 5 Am. Dec. 291, 310 (1811) (Kent, J.) (disfavor of retroactive laws is based on the notion that "the power of the law-giver is limited and defined"); Smead, *supra*, at 797 (American law "transpos[ed] [the] principle [against retroactive laws] . . . into an effective transcendental limitation on legislative power"); *see also* The Federalist No. 44, at 128-29 (James Madison). As Justice Harlan explained in the context of the criminal law:

> Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons.

James v. United States, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part, dissenting in part). *Accord, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring) (noting applicability of these concerns in the civil law context).

This healthy mistrust of retroactive laws—criminal and civil—is reflected in the constitutions of both the United States and the several states. To ensure that "legislatures [are] restrained from enacting arbitrary or vindictive legislation," *Miller v. Florida*, 482 U.S. 423, 429 (1987), and that "legislative enactments give 'fair warning of their effect,'" *id.* at 430 (citation omitted), the Constitution's Ex Post Facto and Bill of Attainder clauses proscribe all retroactive punitive legislation. *See* U.S. Const., art. I, § 9, cl. 3. The constitutions of several states even more broadly outlaw all legislation, including civil legislation, which has retroactive effects. *See, e.g.*, N. H. Const., pt. 1, art. 23; Colo. Const., art. II, § 11; Mont. Const., art. XIII, § 1, cl. 3; Ohio Const., art. II, § 28. And the federal constitution, while not proscribing all retroactive civil legislation, generally bars (or demands compensation for) civil laws that destroy or impair vested or contractual rights, *see, e.g., Hodel v. Irving*, 481 U.S. 704 (1987); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977), and requires that "[t]he retrospective aspects of [all] legislation, as well as the prospective aspects, . . . meet the test of due process," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Indeed, this Court has made it clear that "the justifications for the latter may not suffice for the former," *id.*, and has stated that it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness." *Id.* at 17-18.

Not surprisingly, the rules of construction that this Court has adopted for interpreting nonpenal civil statutes reflect the same skepticism about retroactive laws. *Accord, Bonjorno*, 494 U.S. at 855-56 (Scalia, J., concurring); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227-29 (7th Cir. 1992) (Posner, J.), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 3, 1992) (No. 92-977). Thus, the Court has announced that " 'the first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past . . . .' " *Greene v. United States*, 376 U.S. 149, 160 (1964) (citation omitted). Applying this "first rule" of construction, the Court has long held that:

> Words in a statute [do not] have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806).[2]

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[2] *See also, e.g., Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952) ("[A] statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication"); *Miller v. United States*, 294 U.S. 435, 439 (1935) ("The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears"); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears."); *Schwab v. Doyle*, 258 U.S. 529, 537 (1922) ("It is the proclamation of both [principle

As Justice Scalia has explained, this presumption of non-retroactivity "gives effect to enduring notions of what is fair, and thus accords with what legislators almost always intend." *Bonjorno*, 494 U.S. at 856 (Scalia, J., concurring). And, by requiring that Congress be explicit about its intentions, the principle impedes retrospective legislative sanction of specific persons or classes of persons and thus holds the legislature's "awesome power . . . a little in check." *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d at 228 (Posner, J.). The presumption of prospectivity thereby promotes the same principles of justice and limited government through checks and balances that underlie the more express and unyielding constitutional protections against retroactive laws. *Accord*, Joseph Story, *Commentaries on the Constitution*, § 1398; *Luddington*, 966 F.2d at 227-28.[3]

Of course, "[i]t will remain difficult, in many cases, to decide whether the presumption has been overcome by text, and indeed to decide whether a particular application *is* retroactive." *Bonjorno*, 494 U.S. at 857 (Scalia, J., concurring) (emphasis in original). Whether a particular application is retroactive will "depen[d] upon what one considers the determinative event by which retroactivity or prospectivity is to be calculated." *Id.* at 857 n.3. And many new laws—especially new laws concerning trial procedures such as jury trials and evidentiary rules—will typically be triggered only by events that occur after the dates of their enactment. *Accord, Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d

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and authority] that a statute should not be given a retrospective operation unless its words make that imperative. . . .").

[3] As Justice Scalia noted in his concurrence in *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 837, 841-42 n.1 (1990), the presumption of non-retroactivity is inapplicable in the context of laws repealing punishments. *See Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871). Such laws repealing punishments implicate none of the concerns that inform the longstanding jurisprudential disfavor of retroactive laws.

929, 939 & n.5 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992) (except when applied to cases already adjudicated, rules aimed at trial procedure generally do not require retroactive application). But where a retroactive application of a nonpenal civil statute is sought, the presumption against retroactivity is "very strong," *United States Fidelity and Guar. Co. v. United States*, 209 U.S. 306, 314 (1908), and remains the governing principle today.

Thus, in *United States v. Security Industrial Bank*, this Court held that:

> [A] retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

459 U.S. 70, 79 (1982) (citation omitted). Likewise, in *Bennett v. New Jersey*, 470 U.S. 632, 641 (1985), the Court reiterated that nonpenal laws will be construed to apply only prospectively "absent a clear indication to the contrary in the relevant statutes or legislative history." And, in *Bowen v. Georgetown University Hospital*, 488 U.S. at 208, the Court said that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."

II. THE CIVIL RIGHTS ACT OF 1991 DOES NOT CLEARLY AND UNEQUIVOCALLY COMMAND APPLICATION OF ITS TERMS TO CONDUCT OR TRIALS OCCURRING BEFORE THE DATE OF ITS ENACTMENT

In this case, petitioners recognize that they are seeking to apply the Civil Rights Act of 1991 retroactively. Specifically, they state (Pet. Br. 9, 14) that they are seeking to apply Section 101's new substantive rights to conduct that occurred prior to the Act's enactment and that, if the Court does not do so, the correlative damages remedies and jury trial rights that impliedly attach to

Section 1981 claims will not be available to them. Indeed, although they attempt to evade the issue by suggesting (Pet. Br. 9, 29) that the court below vacated a discharge ruling that it in fact affirmed (*see* note 1, *supra*), petitioners are in fact seeking to have Section 101's new rights and correlative damages remedies and jury trial rights applied retroactively to claims that have already been adjudicated and have been held to be without merit.

Under this Court's traditional presumption, the Act may be retroactively applied in this unjust and wasteful fashion only if the statute clearly and unequivocally commands such an application. Contrary to the argument of petitioners and the Solicitor General, nothing in the Act's language, legislative history, or purposes provides this clear and unequivocal command.

A. The Language Of Section 402(a) Does Not Clearly And Unequivocally Command Retroactivity

The Act's general effective date provision, Section 402(a), provides that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." As the court below and a number of other courts of appeals have concluded, this ambiguous language has a variety of conceivable meanings: "it could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of the date of enactment." *Rivers v. Roadway Express, Inc.*, No. 91-3348 (6th Cir. Aug. 24, 1992) (Pet. App. 12a). *See also, e.g., Gersman v. Group Health Ass'n*, 975 F.2d 886, 888-89 (D.C. Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 13, 1993) (No. 92-1190); *Rowe v. Sullivan*, 967 F.2d 186, 192 (5th Cir. 1992); *Mozee*, 963 F.2d at 932-33.

When Congress included this facially ambiguous language in the Act, however, it was not writing on a

clean slate. This statutory language had been used many times before and the courts had routinely interpreted this language to apply only to conduct and trials occurring after the date of the statutes' enactments. *See, e.g., Yakim v. Califano*, 587 F.2d 149, 150 (3d Cir. 1978) (Black Lung Benefits Reform Act of 1977); *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 529 (4th Cir.) (National Flood Insurance Act), *cert. denied*, 112 S. Ct. 417 (1991).

Indeed, Congress had included such language in the 1978 amendments to Title VII made by the Pregnancy Discrimination Act ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 (1978), which overruled this Court's decision in *General Electric v. Gilbert*, 429 U.S. 125 (1976), and in the 1978 amendments to the ADEA, Pub. L. No. 95-256, 92 Stat. 189 (1978), which overruled this Court's decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977). Again, courts construing the PDA and the 1978 ADEA amendments held that those statutes applied only to conduct and trials occurring after the dates of their enactments. *See, e.g., Jensen v. Gulf Oil Refining & Mktg. Co.*, 623 F.2d 406, 413 (5th Cir. 1980) (construing 1978 ADEA amendments); *Sikora v. American Can Co.*, 622 F.2d 1116, 1123-24 (3d Cir. 1980) (same); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1140 (4th Cir. 1980) (construing PDA); *Schwabenbauer v. Board of Education*, 667 F.2d 305, 310 n.7 (2d Cir. 1981) (same).

Congress is presumed to have been aware of the prior judicial interpretation of this language and, by including that language in Section 402(a), to have adopted that interpretation for purposes of this Act. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). This presumption is especially appropriate where, as here, the Act amended the very same statutes that had previously been amended—and amended with prospective effect

only—through the same "effective date" language used here. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978).[4]

B. The Act's Structure And Legislative History Do Not Clearly And Unequivocally Command Retroactive Application

In seeking to avoid the facial ambiguity of Section 402(a)'s language and the suggestion of prospectivity that arises from prior judicial interpretation of statutes containing similar language, petitioners and the Solicitor General argue (Pet. Br. 12-18; U.S. Br. 6-7, 12-15) that Section 402(a) must be construed as generally rendering the Act retroactively applicable in order to give independent and particular effect to other language in the Act concerning effective dates. Indeed, joined by the petitioners in *Landgraf v. USI Film Products*, No. 92-757 (U.S. cert. granted Feb. 22, 1993) (Pet. Br. 92-757, at 15-20), but not by the Solicitor General (U.S. Br. 15-16), petitioners argue (Pet. Br. 18-19, 22-26) that the statute's legislative history shows that Congress specifically intended that the Act generally be applied retroactively. This argument simply misunderstands the statute's structure and legislative history.

1. It is important to recognize at the outset that canons which ordinarily counsel in favor of searching for a construction that gives all language in a statute independent

[4] Indeed, construing the language of Section 402(a) as generally making the Act retroactive would run afoul of the canon of construction that courts should construe statutes, if at all possible, so as to avoid constitutional problems. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Although petitioners apparently do not claim that the Act applies to cases in which final judgments have been entered, they do not point to anything in the language of Section 402(a) that purports to draw a distinction between final and non-final judgments. This statutory omission would raise serious due process concerns if the Act were construed generally to apply retroactively. *See, e.g., Hodges v. Snyder*, 261 U.S. 600, 603 (1923).

and particular effect cannot be mechanically applied in the context of this Act's effective date provisions. Although petitioners and the Solicitor General bring *three* effective date provisions to the attention of the Court, they studiously and tellingly ignore a *fourth* effective date provision in the Act. Section 110 of the Act establishes an institute through which the EEOC is to provide technical assistance and training on employment discrimination laws and regulations, and subsection (b) of that provision states that: "The amendment made by this section shall take effect on the date of the enactment of this Act." 105 Stat. 1078. This language is essentially identical to, and *unavoidably* redundant of, the pertinent language in Section 402(a). That being the case, it is doubtful that the canons of construction upon which petitioners and the Solicitor General rely can bear the weight that is being placed upon them in this case. *See* 2A N. Singer, *Sutherland Statutory Construction* § 47.37, at 258 (4th rev. ed. 1984) (independent and particular meaning need not be given "where [it is] apparent from the context of the act that the [provision] is surplusage"); *see also Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989) (" 'Many of the benefits incorporated in section 1002(1) by the cross-reference to section 186(c) are already found in section 1002(1). Thus it is evident that Congress was not concerned with duplication, but only with assuring that all benefits covered by section 186(c) were also covered by section 1002(1)' " (citation omitted)).

2. In all events, Section 402(a) need not be construed as making the Act generally retroactive in order to give effect to all of the statute's effective date language. The contrary argument of petitioners and the Solicitor General (Pet. Br. 15-16; U.S. Br. 7, 12-14) is in error.

Section 402(a)'s "except as otherwise specifically provided" qualifying clause plainly can find independent and particular effect without construing Section 402(a) as

generally making the Act retroactive. Section 102 of the Act, which creates limited rights to compensatory and punitive damages (as well as to jury trials in cases seeking such damages), applies in cases brought under the ADA as well as in cases brought under Title VII. But the employment law provisions of the ADA were not to become effective until July 26, 1992—more than seven months after the date of the Civil Rights Act's enactment. *See* Pub. L. No. 101-336, § 108, 104 Stat. 337 (1990) (codified at 42 U.S.C. § 12111). Thus, construing the Act to apply only prospectively does not in any way render Section 402(a)'s qualifying clause superfluous; that clause had the effect of ensuring that the Act's damages and jury trial provisions did not become effective for ADA cases until the employment law provisions of the ADA themselves became effective.

It is likewise clear that Section 402(a) need not be construed as generally making the Act retroactive in order to give independent and particular effect to Sections 109(c) and 402(b) of the Act, the two provisions of the Act which unambiguously state that specified sections of the statute do not apply to pre-enactment conduct or trials. Retroactivity is not the only statutory alternative to such unambiguous prospectivity provisions. Ambiguity that leaves the ultimate resolution of the prospectivity versus retroactivity question to judicial default rules of construction is an equally plausible statutory alternative. So understood, the language of Section 402(a) has an independent and particular effect—specifically, it avoids an unambiguous resolution of the prospectivity versus retroactivity question for the Act in general that Sections 109(c) and 402(b) expressly and unambiguously resolve for the particular statutory provisions to which they apply.[5]

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[5] As petitioners concede (Pet. Br. 19, 22-23), Congress was aware, as it is presumed to be aware, that there was an "apparent tension" in this Court's case law concerning whether ambiguous statutory language is presumed prospective or retroactive. *See Bonjorno*, 494 U.S. at 837. This tension created some risk that the courts might eventually hold the Act generally to apply retroactively, notwithstanding the presumptive inference that the Act should be expected to be construed as prospective only—just as other statutes containing language like that in Section 402(a) had been construed. By making Sections 109(c) and 402(b) unambiguously prospective, Congress ensured that the statutory provisions to which those sections specifically relate would in no event be applied retroactively—no matter how the "apparent tension" in the prospectivity case law is resolved and no matter how the various default rules of construction are reconciled. This Court has recognized that Congress sometimes enacts such statutory "insurance" provisions. *See, e.g., Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 838-39 & n.13 (1988); *County of Oregon v. Gunther*, 452 U.S. 161, 170 (1981); *see also Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989).

3. Contrary to petitioners' argument, the Act's legislative history in fact confirms that Congress did not understand either the qualifying clause to Section 402(a) or Sections 109(c) and 402(b) to imply that Section 402(a) makes the Act generally apply retroactively. Indeed, the legislative history confirms that the sponsors of these provisions intended the Act to apply only prospectively.

a. Before Congress enacted Section 402(a), various factions in Congress attempted to enact civil rights legislation that was expressly retroactive. The Civil Rights Act of 1990 included explicit retroactive transition provisions. *See* H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 9, § 15 (1990). But President Bush vetoed the 1990 bill, citing, among other objectionable features, its "unfair retroactivity rules." *See* 136 Cong. Rec. S16418-19 (daily ed. Oct. 22, 1990).

At the beginning of the 102d Congress, Representative Brooks introduced H.R. 1 as the Civil Rights Act of 1991. 137 Cong. Rec. E14 (daily ed. Jan. 3, 1991). Like the vetoed Civil Rights Act of 1990, H.R. 1 contained explicit retroactive transition rules. H.R. 1 stated,

for example, that Section 12 (the predecessor to Section 101 of the Act) would "apply to all proceedings pending on or commenced after June 15, 1989." H.R. 1, 102d Cong., 1st Sess., § 15(a)(6) (Jan. 3, 1991).

The House ultimately passed the Brooks-Fish substitute, which differed from H.R. 1 in only one respect that is significant here. In response to this Court's 1991 decision in *EEOC v. ARAMCO*, 111 S. Ct. 1227 (1991), the substitute contained a provision "extend[ing] Title VII coverage to United States citizens who are employed abroad by American firms." 137 Cong. Rec. H3934 (daily ed. June 5, 1991); *see* H.R. 1, 102d Cong., 1st Sess. § 119(c) (June 11, 1991). This provision, which ultimately became Section 109 of the Act, expressly stated that it did not "apply with respect to conduct occurring before the date of enactment of the Act," a reservation that was clearly necessary at the time because H.R. 1 was otherwise expressly retroactive. *Compare id.* at § 113 (*see* 137 Cong. Rec. H3925 (daily ed. June 5, 1991)) *with id.* at § 119(c) (*see* 137 Cong. Rec. H3926).

b. Although the House passed the Brooks-Fish substitute, Senator Danforth and a coalition of eight other Senate Republicans believed that "there [was] almost no chance that [it] [would] be enacted into law." 137 Cong. Rec. S7020 (daily ed. June 4, 1991). They thus introduced a package of three compromise bills—S. 1207, S. 1208, and S. 1209, 102d Cong., 1st Sess. (1991). 137 Cong. Rec. S2071-78. Section 3 of S. 1207 contained the language that is now Section 101 of the Act. *See id.* at S7021. Section 13(a) contained the predecessor to Section 402(a), stating that, "[e]xcept as provided in subsection (b), this Act and the amendments made by this Act shall take effect upon enactment." *Id.* at S7023. Section 13(b) stated that "[t]he amendments made by Section 5," which had to do with certain challenges to consent orders, "shall apply to proceedings pending on or commenced after June 12, 1989." *Id.*

Although the Administration had fewer objections to this package of bills than it did to the Brooks-Fish substitute, it did object to several provisions, including Section 13(b)'s retroactive application of Section 5. *See* 137 Cong. Rec. S8984 (daily ed. June 27, 1991). On June 27, 1991, Senator Danforth and his Republican co-sponsors attempted to meet the Administration's various concerns by introducing S. 1407, S. 1408 and S. 1409, 102d Cong., 1st Sess. (1991), as substitutes for their initial bills. *See* 137 Cong. Rec. S8983-89 (daily ed. June 27, 1991). In regard to the retroactivity issue, Senator Danforth and his co-sponsors stated that their substitute "made the section in question prospective." *Id.* at S8984. This was accomplished by providing that "[t]his Act and the amendments made by this Act shall take effect upon enactment." 137 Cong. Rec. S8987 (daily ed. June 27, 1991).

As introduced, S. 1407 also contained the *ARAMCO* provision that had been in the Brooks-Fish substitute version of H.R. 1, including the language stating that "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." S. 1407, § 11, 102d Cong., 1st Sess. (1991). *See also* 137 Cong. Rec. S8986-87 (daily ed. June 27, 1991). None of the sponsors so much as mentioned the inclusion of the *ARAMCO* provision.

c. S. 1407, S. 1408, and S. 1409 were then combined and redesignated as S. 1745, which contained the language of Sections 402(a) and 109(c) as eventually enacted. *See* S. 1745, 102d Cong., 1st Sess. (Sept. 24, 1991); *see also* 137 Cong. Rec. S13581-82 (daily ed. Sept. 24, 1991). About a month later, the redesignated bill obtained the support of leading Republicans and Democrats, including Senators Hatch and Kennedy, when a compromise was reached on its treatment of the burden of proof rules applicable in disparate impact cases. *See* 137 Cong. Rec. S15233, S15237 (daily ed. Oct. 25,

1991) (statements of Sen. Kennedy and Sen. Hatch). As part of that compromise, the Republican and Democratic leaders agreed to include the amendment that is now Section 402(b) of the Act, with its highly specific effective date provision, to ensure that the Wards Cove Packing Company could not possibly be affected by the Act's passage. *See* 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991) (§ 22(b)). The compromise did not change in any way the provisions that would become Sections 402(a) and 109(c) of the Act. *See id.* at S15275 (§ 12(c)); *id.* at S15276 (§ 22(a)).

On October 30, 1991, Senator Danforth introduced an interpretive memorandum on behalf of himself and the original co-sponsors of S. 1745 which reiterated their view that "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively." 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991). Senator Danforth explained that the addition of Section 402(b) "is intended only to provide additional assurance that the provisions of the bill will not be applied to certain cases that fit the provisions of that subsection. It should not be read in derogation of the sponsors' intention not to provide for retroactive effect or application as expressed in [Section 402(a)] of the bill." *Id.* at S15483 (statement of Sen. Danforth). However, even though these statements were consistent with all prior explanations that Senator Danforth had made about the effect of the language in Sections 402(a) and (b), Senator Kennedy took the floor and stated that "[i]t will be up to the courts to determine the extent to which the bill will apply to cases and claims that were pending on the date of enactment." *Id.* at S15485 (statement of Sen. Kennedy).

The Senate thereafter proceeded inadvertently to omit Section 402(b) from the draft of the bill that, on October 30, 1991, was passed. Accordingly, on November 5, 1991, Senator Dole insisted that the bill be returned to

the floor so that Section 402(b) could be reinserted into it. *See, e.g.*, 137 Cong. Rec. S15953 (daily ed. Nov 5, 1991) (statement of Sen. Dole). In reintroducing Section 402(b), Senator Dole reiterated that: "[a]bsolutely no inference is intended or should be drawn from the language of this amendment to section 402 that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act." *Id.* at S15953. Senator Kennedy supported Senator Dole's resolution, stating that, "[i]ronically, the defeat of the . . . amendment would make it more likely the courts would not apply the restorations to any pending cases, including the Wards Cove case." *Id.* at S15963 (statement of Sen. Kennedy).

d. This legislative history is entirely inconsistent with petitioners' argument that the qualifying clause to Section 402(a) and the unambiguous prospectivity provisions of Sections 109(c) and 402(b) demonstrate a clear and unequivocal intent of Congress that the Act generally would apply retroactively to conduct and trials occurring before the date of its enactment. On the contrary, as explained above, the legislative history shows that Section 402(a)'s "except as otherwise specifically provided" language originated in S. 1207, which, at that time, had an expressly retroactive provision. It also shows that Section 109(c)'s unambiguous prospectivity language originated in the Brooks-Fish substitute for H.R. 1, which was otherwise expressly retroactive at the time. And the unambiguous prospectivity language of Section 402(b) was placed into the Act expressly to protect the Wards Cove Packing Company from any judicial shifts in the underlying presumption of prospectivity. Indeed, the legislative history shows that the original sponsors of these various provisions understood them to establish prospectivity for the Act, both generally and particularly.[6]

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[6] Petitioners incorrectly suggest (Pet. Br. 23) that the views of Senator Kennedy provide a basis for a contrary understanding. Senator Kennedy had no hand in drafting Section 402(a) and was

4. In all events, the statute's structure and legislative history do not justify generally applying the Act retroactively. At most, they only create doubt about the statute's intended meaning. They plainly do not establish the clear and unequivocal command that is needed for the Act to be applied to conduct or trials occurring before the date of the statute's enactment.

C. The Purposes Of The Act Do Not Establish A Clear And Unequivocal Command For Retroactivity

Quoting from the sole appellate decision that has found a clear and unequivocal command for general retroactive application of the Act's provisions, *see Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993), petitioners and the Solicitor General join the *Landgraf* petitioners in objecting (Pet. Br. 33, 37; U.S. Br. 27-28; Pet. Br. No. 92-757, at 34-35) that it would undermine the purposes of the Act to continue to apply judicial decisions that the 1991 Congress deemed incorrect and remedies and procedures that the 1991 Congress found inadequate. But this objection starts from a false premise.

The Act does not purport to pursue the "purposes" that this objection attributes to it. In the relevant "Findings" provisions of the statute, the 1991 Congress stated only that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace[,]" and that "'egislation is necessary to provide additional protections against unlawful discrimination in employment." CRA §§ 2(1), 2(3); 105

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not its sponsor. Rather, as shown above, he became a supporter of the bill late in the legislative process, after and as a result of a key compromise on the Act's treatment of the burden of proof rules applicable in disparate impact cases. *See* 137 Cong. Rec. S15233, S15237 (daily ed. Oct. 25, 1991) (statements of Sen. Kennedy and Sen. Hatch). Thus, Senator Kennedy's subsequently stated views on the issue of retroactivity are not entitled to special weight; and, in all events, Senator Kennedy stated only that the courts would determine the extent to which the Act would apply to pending cases, *not* that the Act would be fully retroactive in all instances except those set forth in Sections 109(c) and 402(b).

Stat. 1071. In the relevant "Purposes" provisions of the Act, the 1991 Congress stated only that it intended "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace[,]" and "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes . . . ." CRA §§ 3(1), 3(4); 105 Stat. 1071. There is no finding or stated purpose that the Act's new provisions are to be applied to conduct or trials that have already occurred; indeed, the concepts of "deterring" and "providing additional protections" against unlawful conduct, and of "expanding" the scope of the civil rights laws, suggest precisely the opposite conclusion.

This Court should not simply assume on the basis of "vague notions of [the Act's] 'basic purpose' " that Congress intended to act retroactively. *Mertens v. Hewitt Assocs.*, 61 U.S.L.W. 4510, 4515 (U.S. June 1, 1993). Like so many statutes, this Act purported to settle "innumerable disputes between powerful competing interests —not all in favor of potential plaintiffs." *Id.* Particularly in these circumstances, it would " 'frustrate[] rather than effectuate[] legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.' " *PBGC v. LTV Corp.*, 496 U.S. 633, 647 (1990) (citation omitted) (emphasis in original). Indeed, as this Court has observed, "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991). The statute's text and legislative history, when read in conjunction with the traditional presumption of prospectivity, establish that Congress intended to change the rules only for future conduct and future trials; the fact that Congress decided to revise the civil rights laws in response to decisions of this Court, and to expand the remedies and procedures of the pre-existing statutory scheme,

simply does not suggest, much less establish, that Congress intended to act retroactively.[7]

III. THE PRESUMPTION THAT A STATUTE DOES NOT APPLY TO CONDUCT OR TRIALS OCCURRING BEFORE THE DATE OF ITS ENACTMENT APPLIES TO SECTION 101 OF THE CIVIL RIGHTS ACT OF 1991

Apparently recognizing that the text, legislative history and purposes of the Civil Rights Act of 1991 do not clearly and unequivocally command retroactive application of any of its provisions, petitioners and the Solicitor General argue in the alternative (Pet. Br. 20-44; U.S. Br. 7-9, 17-28) that, at least with respect to Section 101 of the Act, no such command is necessary. Rather, citing *Bradley v. School Board*, 416 U.S. at 711, which stated that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary," petitioners and the Solicitor General argue that the rights expressly stated in Section 101, and its correlative remedies and jury trial rights, must be judicially presumed to apply even to conduct and trials that, as here, occurred prior to the statute's enactment. This argument should be rejected.

A. Petitioners Err In Characterizing Section 101 As A Mere Remedial, Procedural Or Restorative Law

As petitioners and the Solicitor General ultimately concede (Pet. Br. 30, 39-43; U.S. Br. 7-8, 17-21), this

[7] Congress regularly passes legislation that overrules decisions of this Court (and the lower federal courts) and that adds new remedies and procedures to pre-existing statutory schemes. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 335-36 (1991) (since 1975, Congress has annually overruled an average of 12 Supreme Court decisions). The argument of petitioners and the Solicitor General does not and cannot explain why this Act, but not all of these countless other statutes, should be interpreted to apply retroactively.

Court's decision in *Bennett v. New Jersey*, 470 U.S. at 639, makes it clear that the presumption of retroactivity arguably found in *Bradley* must be reconciled with the traditional presumption of prospectivity and cannot apply to laws that "affect[] substantive rights and liabilities." Petitioners and the Solicitor General seek to avoid *Bennett* by arguing (Pet. Br. 30-39; U.S. Br. 9, 25-28) that, as a remedial, procedural and restorative law, Section 101 does not "affect[] substantive rights and liabilities." But, even assuming, *arguendo*, that remedial, procedural and restorative laws do not affect substantive rights and liabilities, which they may and frequently do, it is clear that petitioners and the Solicitor General err in characterizing Section 101 as a mere remedial, procedural and or restorative law.

1. *Section 101 Does Not Merely Create New Remedies And Jury Trial Rights For Pre-Existing Wrongs Under Title VII*

Contrary to the argument of petitioners and the Solicitor General (Pet. Br. 32-33; U.S. Br. 25-26), Section 101 does not merely create new remedies and jury trial rights for pre-existing wrongs under Title VII. As the Solicitor General concedes (U.S. Br. 26 n.16), Section 101 prohibits much conduct that Title VII does not prohibit (*e.g.*, Section 101, but not Title VII, applies to small employers), and thus it is inaccurate to say that the two statutes enact the same substantive norm. Even more importantly, however, even if Section 101 and Title VII enacted the same substantive norm, it is nevertheless still the case that Section 101 is a distinct positive law. For this reason, as every court of appeals to address the question has concluded, Section 101 cannot properly be characterized as merely creating new remedies and jury trial rights for pre-existing wrongs under Title VII, much less retroactive ones. *See Hicks v. Brown Group, Inc.*, 982 F.2d 295, 297 (8th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3669 (U.S. Mar. 23, 1993)

(No. 92-1538); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374 n.5 (11th Cir. 1992); *Gersman*, 975 F.2d at 899; *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (U.S. Sept. 29, 1992) (No. 92-737).

That Title VII may already have proscribed some conduct that Section 101 now also proscribes is legally irrelevant. This Court has recognized that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974). It has thus held, for example, that the non-discrimination rights and obligations that collective bargaining agreements create and that are enforceable under the federal labor laws must be treated as legally distinct from the non-discrimination rights and obligations that Title VII creates—even if they are identical in content. *Id.* at 50-51. Likewise, the Court has long held that the rights that Section 1981 and Title VII establish are "separate, distinct, and independent." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 476 n.14 (1975); *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979). As with Title VII and these other laws, Title VII and Section 101 were enacted at different times, and by different Congresses. Thus, the substantive rights and obligations positively created by Title VII and Section 101, while similar in content in certain respects, must be treated as legally distinct and independent from each other. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). The amendment that Section 101 makes to Section 1981 is not drained of its substantive content simply because Title VII contains a somewhat similar behavioral prohibition.

Indeed, to treat Section 101 as merely creating new (retroactive) remedies and procedures for pre-existing wrongs under Title VII would frustrate the intent of Congress. In enacting Section 101, Congress treated it as statutorily separate and distinct from the rights and enforcement scheme of Title VII. Thus, whereas Section 101 expressly expands the substantive rights (and thus implicitly expands the correlative remedies and jury trial rights) available in Section 1981 cases, it is Section 102 of the Act that supplies new damages remedies and jury trial rights for cases brought to enforce rights created under Title VII. The new damages remedies and jury trial rights available under Section 102, however, are subject to distinct statutory limitations that do not apply to or limit cases brought under Section 101; just as the markedly different remedies and procedures available under Title VII, as originally enacted, were subject to distinct statutory limitations not applicable to Section 1981. *See United States v. Burke*, 112 S. Ct. 1867, 1873 & n.12 (1992). Thus, Section 102 confirms that the remedies and procedures available under Section 101 are not to be applied in cases involving Title VII's prohibitions and, concomitantly, that Section 101 may not properly be treated as a mere (retroactive) remedial and procedural supplement to Title VII. To do so would violate the "frequently stated principle of statutory construction . . . that[,] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *see also, e.g., Patterson*, 491 U.S. at 181; *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976).[8]

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[8] The question whether the new damages remedies and jury trial rights created by Section 102 of the Act apply retroactively is at issue in the companion case to this one, *Landgraf v. USI Film Products*, No. 92-757. However, petitioners in this case have not argued that Section 102 applies retroactively to their Title VII claims; their argument is limited to whether Section 101 of the Act applies retroactively to their Section 1981 claims.

2. *Section 101 Is Not A Mere "Restorative" Law*

Just as it does not merely create new remedies and procedures for pre-existing wrongs under Title VII, Section 101 does not merely "restore" Section 1981 to the state allegedly intended by the Congress that enacted it. The contrary argument of petitioners and the Solicitor General (Pet. Br. 35-39; U.S. Br. 26-28) is plainly wrong.

To begin with, petitioners err in their repeated, self-serving—and, we believe, legally irrelevant—assertion (Pet. Br. 10-11, 27-28, 35-39) that it was clear at the time of the conduct at issue in this case that respondent could be held liable under Section 1981 for the alleged discriminatory discharges of petitioners. At the time, it was clear that several Justices of this Court held the view that the interpretation of Section 1981 announced in *Runyon v. McCrary*, 427 U.S. 160 (1976), was incorrect and that *Runyon*'s reach should be limited, if not reconsidered. *See id.* at 187 (Powell, J., concurring); *id.* at 192 (White, J., & Rehnquist, J., dissenting); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 406 (1982) (Stevens, J., concurring). Moreover, at the time, while a number of courts had held or assumed that Section 1981 applied to discriminatory discharge claims, a number of lower courts had held that Section 1981 did not apply to all aspects of the employment relationship. *See, e.g., Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F. Supp. 752, 757 (W.D. Mo. 1986); *Minority Police Officers v. City of South Bend*, 617 F. Supp. 1330, 1352 n.52 (D. Ind. 1985), *aff'd*, 801 F.2d 964 (7th Cir. 1986) (same). Indeed, the Fourth Circuit decision that led to the certiorari grant and ultimate decision in the *Patterson* case had been fully briefed and argued by this time—and was rendered only two months later. *See Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). In short, the law under Section 1981 was in a state of flux at the time, and it was certainly foreseeable that, when presented

with the question, this Court might hold Section 1981 to be inapplicable to claims that did not concern the initial formation or enforcement of a contract. *See Gersman*, 975 F.2d at 900 n.7 ("[I]t is far from altogether clear that the law before *Patterson* was universally perceived to be contrary to the *Patterson* holding.").

In any event, petitioners plainly err in suggesting that the question whether Section 101 is a "restorative" law can properly be determined by reference to what conduct particular individuals may at the time have subjectively believed was or was not covered by Section 1981. The nature and reach of a law cannot shift and spring on the basis of such individual expectations and understandings; to allow it to do so would result in courts having to make unwieldly distinctions between litigants on the basis of their equitable and reliance interests and, even more importantly, to treat similarly-situated litigants differently merely because they viewed the requirements of the law differently. *Accord, Harper v. Virginia Dep't of Taxation*, No. 91-974, slip op. at 6-7, 8-9 (U.S. June 18, 1993).

Indeed, in the context of determining whether a subsequent law is "restorative" of a prior law, it is inconceivable that the issue would turn on the subjective or, for that matter, the objective understandings of the prior law by particular individuals. No private individual can determine what Congress will intend to do in a later enactment. Only the later enacting Congress can determine whether it is "restoring" either a prior Congress's supposed intent or a prior judicial interpretation of that intent. Moreover, while the consistency and quality of judicial interpretations of a prior law may influence the later Congress's judgment about whether it is appropriate to enact a "restorative" law, such interpretations are not determinative of that subsequent congressional intent. Rather, that subsequent intent can be established only by the language, structure, and legislative history of the subsequent statute. And, contrary to petitioners' argument, the language, structure, and legislative history

of the Civil Rights Act of 1991 do not manifest an intent to "restore" Section 1981 to some alleged prior state—much less to "restore" it retroactively.

As noted above, the Act's "Findings" section speaks only of the need for "*additional* protections against unlawful discrimination in employment" and "*additional* remedies . . . to deter" such discrimination. CRA §§ 2(1), 2(3); 105 Stat. 1071 (emphases added). As also noted above, the Act's stated "Purposes" are, among other things, only "to provide appropriate remedies for intentional discrimination," "to codify" this Court's definitions of "business necessity" and "job related" in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and subsequent decisions, and "to respond" to other decisions of this Court, including *Patterson*, "*by expanding* the scope of relevant civil rights statutes." CRA §§ 3(1), 3(2), 3(4); 105 Stat. 1071 (emphasis added). The Act thus does not state anywhere that it intends to "restore" Section 1981 to any supposed prior state.

In fact, the omission of such a stated intent was not accidental. The Act's legislative history shows that certain factions in Congress wished to pass legislation with express statements of "restorative" intent. But they failed. And the final statutory language points in the other direction.

As is implicit in petitioners' argument (Pet. Br. 25, 38-39 n.36), the Bush Administration initially opposed any legislative revision of Section 1981 as interpreted by the *Patterson* Court, preferring instead to study the effects of the Court's interpretation. Moreover, when the Administration finally agreed to a legislative revision of Section 1981, then-Deputy Attorney General Donald B. Ayer explicitly testified:

> that important changes are necessary in two areas. The first is the situation posed by the U.S. Supreme Court's decision in the *Patterson* case involving section 1981 . . . . The U.S. Supreme Court read

> . . . the words "make and enforce," which are indeed the words of the statute, to mean precisely that, one might say read them narrowly in terms of their precise meanings, and I must say in that, I think, acted reasonably.
>
> But at the same time as I say they acted reasonably, I think the Court left us with a situation plainly requiring legislative change.

Civil Rights Act of 1990: Hearing on S. 2104 Before the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 107 (1990); *see id.* at 105 ("the decisions . . . are well within the zone of reasonable interpretation"). Deputy Attorney General Ayer's views were echoed by key Republicans in Congress. *See, e.g.*, 135 Cong. Rec. S10221 (daily ed. Aug. 4, 1989) (statement of Sen. Hatch) (noting that the *Patterson* Court gave "[a] reasonable reading" of Section 1981); 136 Cong. Rec. S1523 (daily ed. Feb. 22, 1990) (statement of Sen. Dole) ("Although [*Patterson*] . . . may have been correct as a matter of statutory construction, the Justice Department believes—and I agree—that legislation is needed to ensure that the underlying purposes of our Federal civil rights laws are not needlessly frustrated.").

Of course, the Civil Rights Act of 1990 nevertheless included express "restorative" language. *See* S. 2104, 101st Cong., 1st Sess. (1990), *reprinted in* 136 Cong. Rec. H6827-30 (daily ed. Aug. 3, 1990). S. 2104 stated that its purpose, among other things, was "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." *Id.* at H6827 (§ 2(b)(1)). Moreover, the bill had two provisions with express "restorative" intents: Section 4 was entitled "Restoring The Burden Of Proof In Disparate Impact Cases," *id.* at H6827-28; and Section 12, which addressed the *Patterson* decision, was entitled "Restoring Prohibition Against All Racial Discrimination In The Making And Enforcement Of Contracts," *id.* at H6829. Indeed, Section 15 set out express

rules for applying those various provisions retroactively, including Section 12. *Id.*

But President Bush vetoed the Civil Rights Act of 1990. *See* 136 Cong. Rec. S16418-19 (daily ed. Oct. 22, 1990). Moreover, in his veto message, President Bush made it clear that he did not view the Administration's proposal to revise Section 1981 as serving a "restorative" purpose at all; rather, he explained that his alternative bill would "create expanded protections against on-the-job racial discrimination by extending 42 U.S.C. § 1981 to the performance as well as the making of contracts." 136 Cong. Rec. S16418 (daily ed. Oct. 22, 1990).

In 1991, the battle among the competing factions continued. The House passed H.R. 1, which, like the vetoed Civil Rights Act of 1990, contained express indications of both a restorative and retroactive intent. *See* H.R. 1, 102d Cong., 1st Sess. §§ 2(b)(1), 102, 110, 113 (June 11, 1991). Ultimately, however, a majority agreed upon provisions with titles that do not have express restorative purposes (or retroactive transition rules). *See* CRA § 105, 105 Stat. 1074 ("Burden of Proof in Disparate Impact Cases"); CRA § 101, 105 Stat. 1071 ("Prohibition Against All Racial Discrimination In The Making And Enforcement Of Contracts"). And the majority agreed that the Act's express "Purposes" would speak only of "respond[ing]" to Supreme Court decisions, and of "expanding" the remedies and protections of the civil rights laws, rather than "restoring" them. *See* CRA § 3, 105 Stat. 1071.[9]

[9] In doing so, some members of Congress claimed that the revision to Section 1981 served a restorative purpose, while others claimed that it did not. *Compare* 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (Edwards interpretive memorandum) (Section 101 has restorative purpose); *id.* at S15234-35 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) (same); *with id.* at H9543 (daily ed. Nov. 7, 1991) (Hyde interpretive memorandum) (Section 1981 is being expanded); *id.* at S15472 (daily ed. Oct. 30, 1991) (Dole interpretive memorandum) (same).

Thus, the text and legislative history of the Act fail to support petitioners' contention that Congress had a different opinion as to the original meaning of the Civil Rights Act of 1866 than did this Court and, in passing Section 101, was acting to "restore" that original intent or some prior judicial interpretation of that intent. While some factions in Congress may have held this view, neither the statute's text nor its legislative history suggests that a majority agreed upon it.

B. Even Remedial, Procedural And Restorative Laws Are Subject To The Traditional Presumption Of Prospectivity

In any event, even if Section 101 of the Act could properly be characterized as in some sense "remedial," "procedural" or "restorative," it still would be subject to the traditional presumption that statutes are not applied to conduct or trials occurring before the dates of their enactment unless Congress has clearly and unequivocally so required. The Court has in fact held that the "rule [t]hat a statute shall not be given retroactive effect unless such a construction is required by explicit language or by necessary implication . . . has been applied by this Court to statutes governing procedure," *United States v. St. Louis, San Francisco & Texas Ry.*, 270 U.S. 1, 3 (1926). It is therefore clear that that presumption would apply in the event a litigant was seeking retroactive application of a new, free-standing jury trial right to a trial that had already occurred. However, in the context of Section 101, there is no separate issue as to whether a free-standing jury trial right is presumed to apply only prospectively; the jury trial right that is implicitly embodied there applies only where the substantive right and correlative remedies of that section apply. And it is clear that the traditional presumption applies to Section 101's substantive rights and correlative remedies, even if they could be described as having a "remedial," "procedural," or "restorative" character.

1. *New Damages Rules And Restorative Laws May Affect Substantive Rights And Liabilities*

Contrary to the argument of petitioners and the Solicitor General, new damages rules and supposedly restorative laws are plainly laws that may "affect[] substantive rights and liabilities," laws which even petitioners and the Solicitor General admit (Pet. Br. 30, 39-44; U.S. Br. 17-21) are subject to the traditional presumption of prospectivity. While the Court has not had occasion specifically to discuss what laws may "affect[] substantive rights and liabilities," it has equated that phrase with the scope of the traditional presumption of prospectivity. *See Bennett v. New Jersey*, 470 U.S. at 639. Moreover, the Court has held that the traditional presumption of prospectivity applies to any law "by which human action is regulated." *Union Pacific R.R. v. Laramie Stock Yards*, 231 U.S. 190, 199 (1913). *Accord, Reynolds v. M'Arthur*, 27 U.S. at 434. New damages rules and supposedly restorative laws plainly may constitute such laws.

a. Just as with laws that impair vested rights or establish new standards of conduct, laws that create new damages rules regulate human action—*i.e.*, they materially change the legal consequences of human behavior. Thus, in its Ex Post Facto cases, the Court has said that " '[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty' after the fact." *Weaver v. Graham*, 450 U.S. 24, 28 n.9 (1981) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798) (Paterson, J.)). *See also Miller v. Florida*, 482 U.S. at 433 ("a change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.' " (citation omitted)). And, likewise, in its civil cases, the Court has applied the traditional presumption of prospectivity to laws that would increase, for example, the interest award that attaches to a liability. *See United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928). A retroactive change in the damages rules applicable to a claim "attaches a new disability, in respect to transactions or considerations already past," *Sturges v. Carter*, 114 U.S. 511, 519 (1888), and thereby plainly "affect[s] a substantive right or liability," *Bennett*, 470 U.S. at 639.

Importantly, application of the presumption of prospectivity to new damages rules furthers the policy that citizens should have a fair opportunity to avoid the sanctions established for the law's violation. As Judge Posner has explained, "[t]he amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change." *Luddington*, 966 F.2d at 229. "That is the philosophy behind the ex post facto clause and also behind the interpretive principle that presumes that a new civil statute applies only to conduct that occurs after its effective date." *Id.*

Contrary to the argument of the Solicitor General and the petitioners in these consolidated cases (Pet. Br. 28-29; U.S. Br. 22-23; Pet. Br. No. 92-757, at 31-32), this understanding of the presumption does not assume that an employer has a "vested right to do wrong" or can "pay for the right to discriminate." It is important to remember that, while Section 101 prohibits only intentional discrimination, the argument that remedial laws should be presumed retroactive cannot logically be limited to the intentional discrimination context. Rather, the argument extends to all sorts of laws—*e.g.*, tax laws, immigration laws, farm crop subsidy laws, and all types of employment laws, including those that impose liability on the basis of negligence, recklessness or even just socially unacceptable consequences (such as a law that prohibits employment policies with a disparate impact which are not justified by "business necessity"). Even the *Landgraf* petitioners appear to concede (Pet.

Br. No. 92-757, at 32 n.28) that, in such contexts, the law in fact routinely instructs individuals to determine the amount of care that must be taken by, among other things, comparing the costs and benefits of taking additional precautions.

Even in the context of intentional discrimination laws, the suggestion that a presumption of prospectivity for remedial laws assumes that an employer has a right to pay to discriminate is more invective than analysis. As the late-Justice Marshall recognized:

> An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy.

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 75 (1986) (Marshall, J., concurring). The question, then, that employers face is not whether they should pay for the right to intentionally discriminate. Rather, the question for an employer is how much to invest in programs for education, training, detection, discipline and other methods of prevention to ensure that *others* do not intentionally discriminate (or appear to have discriminated), and thereby cause liability to be vicariously imposed on the employer through principles of *respondeat superior*. Knowledge of the remedies applicable under a statute plainly and properly affect an employer's entirely non-discriminatory resolution of this negligence-type question. *See id.* at 70-72 (agreeing with EEOC that employer liability under Title VII for sexual harassment may be affected by the precautions and safeguards that an employer has adopted); *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 728 (1989) (holding that, if municipalities were subject to *respondeat superior* liability under

Section 1981, "the careful balance drawn by the 42d Congress between local autonomy and fiscal integrity and the vindication of federal rights could be completely upset").[10]

While the foregoing suffices for present purposes, we would add that the presumption of prospectivity naturally and properly extends to protecting expectations about the remedial consequences of even calculated non-compliance with the law. In the criminal context, it is plain that the Ex Post Facto Clause protects such expectations. *See Weaver*, 450 U.S. at 30; *James v. United States*, 366 U.S. at 247 n.3 (Harlan, J.). In the civil context, while the constitutional prohibition is not nearly so absolute, the philosophy of the *ex post facto* rule still applies, for "many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable [for]" substantially increased civil sanctions—*e.g.*, civil forfeiture of their cars. *See Luddington*, 966 F.2d at 229. Indeed, in both the civil and criminal contexts, the

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[10] Indeed, even where an employer's own allegedly intentionally discriminatory conduct is in issue, a presumption of prospectivity for remedial laws does not assume a right to pay to discriminate. The remedies applicable to an intentional discrimination law affect whether a law-abiding employer simply avoids or postpones lawful adverse employment actions—and instead engages, for example, in progressive discipline such as warnings—because the risk and penalties of misperceived motives are too great. They also affect whether an employer engages in demographic testing or validation efforts prior to implementing an employment policy or practice. They further affect how much time, effort and expense an employer incurs in contemporaneously documenting the lawful reasons for its actions—so that its decisions will be easier to defend in the event that they are challenged. In addition, the available remedies affect whether an employer obtains a legal opinion before going forward with a decision, or offers severance pay in exchange for a release of a possible claim. And the remedies applicable to a possible claim affect the time, effort and expense that an employer incurs in preserving and preparing the testimony of witnesses, developing its litigation strategy, and putting on its case at trial. In other words, the remedies available under a law shape a wide variety of behavior that is entirely independent of any decision whether to violate the law.

retroactive application of new sanctions is inconsistent with the principle that legislatures are ill-suited to the task of retrospectively identifying wrongdoers and imposing punishments. *Id.* at 228; *see also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. at 17-18 (the Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness."). In short, even in the civil remedial context, the traditional presumption of prospectivity furthers the principles of justice and limited government through checks and balances that underlie the historic disfavor of retroactive laws. *Accord, Luddington*, 966 F.2d at 228.

In the final analysis, therefore, there is simply nothing jurisprudentially anomalous about the situation where Congress amends a law and adds new remedies to a preexisting statutory scheme. Though it would be wrong to do so (for the reasons explained above), it may even be assumed, as do petitioners and the Solicitor General, that retroactive remedial laws harbor less potential for mischief and are less likely to upset settled expectations or impair vested rights than other kinds of laws. Those are simply reasons, however, why contemporary policies and politics may lead Congress to act retroactively, and reasons why this Court may be inclined to sustain such retroactive remedial legislation against constitutional challenge. They are not reasons to presume that Congress has chosen to act retroactively. On the contrary, because retroactive remedial laws may alter the legal consequences of human action just as surely as may laws addressing substantive standards of conduct, the judicial inquiry should remain the same—*i.e.*, the Court should require a clear and unequivocal statement by Congress of an intent to act retroactively. *Accord, Prince v. United States*, 19 F. Cas. 1331, 1332 (C.C.D. Mass. 1814) (No. 11,425) (Story, J.) ("it is a general rule, that statutes are to be construed to operate in futuro . . . . And *this maxim applies as well to remedial as to other statutes*") (emphasis added).

There is, in fact, an important practical reason to preserve the traditional presumption of prospectivity in this

context. The issue here is what the so-called default rule of construction should be in cases where Congress has failed to make its intentions clear and unequivocal. The simpler that default rule of construction is, the more likely it is that the rule will serve its purpose of allowing Congress, the courts and the citizenry to know what Congress must do in order to make its laws retroactive. As even the Solicitor General concedes (U.S. Br. 21), however, distinguishing between substantive laws, on the one hand, and remedial (and procedural) laws, on the other hand, is not a simple feat; and petitioners and the Solicitor General acknowledge that, even after that herculean feat is completed, the three-factor "manifest injustice" test still must be applied to determine whether a remedial (or procedural) law is retroactive. Indeed, the Solicitor General would add yet another level of analysis for lawsuits against the government. *See* U.S. Br. 21 n.11. It is clear, therefore, that a presumption of retroactivity for remedial (and procedural) laws would dramatically increase the work required of the courts in interpreting statutes and, even more importantly, defeat the law-informing and facilitating functions of the default rule of construction that is at issue. There is no good reason to adopt such an impractical interpretive course.

b. Nor is there good reason to adopt that interpretive course in the context of so-called "restorative" laws. "Restorative" laws plainly may change the legal consequences of human conduct. That they do so makes them quintessential examples of laws that may "affect substantive rights and liabilities."

Contrary to the suggestion of petitioners and the Solicitor General (Pet. Br. 29-30, 35-37; U.S. Br. 25-26), it does not matter that the so-called "restorative" law may be consistent as a matter of fact with the subjective or, for that matter, objective expectations of the particular parties at the time the alleged conduct took place. As noted above, litigants cannot "be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old

rule and how they would suffer from application of the new." *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2447 (1991) (Opinion of Souter, J.). "The applicability of rules of law are not to be switched on and off according to individual hardship[.]" *Id.* at 2448. *Accord, Harper v. Virginia Dep't of Taxation*, No. 91-974, slip op. at 6-7 n. 9, 8-9. Indeed, a contrary rule would create "enormous satellite litigation," *Luddington*, 966 F.2d at 229, in which courts would be required to make "unwieldy distinctions between classes of litigants based on the degree to which they relied on the legal regime antedating the [passage of the statute.]" *Uncle Ben's, Inc.*, 965 F.2d at 1374. In any legal "system that aspires to fairness and equality, . . . the substantive law will not shift and spring on such a basis." *James B. Beam Distilling Co.*, 111 S. Ct. at 2447. *Accord, Harper v. Virginia Dep't of Taxation, supra.*

Nor may the retroactivity of a statute turn, as petitioners and the Solicitor General suggest (Pet. Br. 36-39; U.S. Br. 26-28), on whether a subsequent Congress purports to be correcting what it deems to be an erroneous judicial interpretation of an earlier statute. "[I]t would be naive to suppose that Congress sits to review the interpretive soundness of judicial decisions. Congress is not a judicial body, let alone a body of academic commentators on judicial decisions." *Luddington*, 966 F.2d at 228. Moreover, this Court has repeatedly stressed that " '[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,' " and that " '[i]t is the intent of the Congress that enacted [the act] . . . that controls.' " *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. at 840 (citations omitted).

"Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law." *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991). But "[w]hen a subsequent Congress amends the law in response to the

Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's 'restoration' efforts is newly created law." *Id.* at 1338. As with any newly enacted legislation, Congress must state its intentions with regard to retroactivity clearly and unequivocally. *Accord, Dash v. Van Kleeck*, 5 Am. Dec. at 312; *Luddington*, 966 F.2d at 228.

Again, "[t]here is nothing jurisprudentially unique about the situation where Congress amends a statute in response to the Supreme Court's interpretation." *DeVargas*, 911 F.2d at 1388. To be sure, the "restorative" purpose of a law may sometimes lead Congress to choose to act retroactively; it may provide the political basis for doing so (just as it may provide the political basis for enacting a purely prospective law); or it may provide a suggestion of Congress's intent to act retroactively. Restorative purpose may also in some cases provide the justification for sustaining a retroactive law against constitutional challenge. But the restorative nature of a law should not change the threshold judicial inquiry into whether Congress has acted retroactively. The principles of justice and limited government through checks and balances that underlie the presumption of prospectivity—*i.e.*, fair warning of the law and its sanctions, and limiting the ability of those who frame the law retrospectively to identify wrongdoers and impose sanctions—still require that Congress make its intent to restore the law *retroactively* clear and unequivocal. Indeed, as with new damages laws, altering the judicial inquiry for so-called "restorative" laws would needlessly increase the workload of the courts and unnecessarily complicate—in fact, defeat—the law-informing and facilitating functions of the default rule of construction that is in issue.

2. *This Court's Case Law Does Not Justify Excepting Remedial, Procedural Or Restorative Laws From The Traditional Presumption Of Prospectivity*

In arguing that new damages rules (and correlative jury trial rights) and restorative laws should nevertheless be presumed to apply retroactively, petitioners and the Solicitor General purport to find substantial justification for their position in this Court's case law. *See* Pet. Br. 20-22, 27-29, 33-34, 35, 39-44; U.S. Br. 17-21. But the Court's cases in fact do not justify excepting remedial, procedural or restorative laws from the traditional presumption of prospectivity.

a. To begin with, petitioners plainly err in suggesting (Pet. Br. 39-44) that, under this Court's cases, either new damages laws (and correlative jury trial rights) or restorative laws are not "retroactive" at all. Contrary to petitioners' suggestion (Pet. Br. 40), "retroactivity" is not a "term of art" which refers only to laws that would disturb vested rights or change substantive standards of conduct. Rather, the Court has defined a "retroactive" law as one that "assign[s] . . . a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed." *Union Pac. R.R. v. Laramie Stock Yards,* 231 U.S. at 199; *see also, e.g., Sturges v. Carter,* 114 U.S. at 519 ("'[E]very statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.'" (citation omitted)); *Miller v. Florida,* 482 U.S. at 430 ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" (citation omitted)). Thus, while some such laws (such as trial procedures) may generally have only prospective effect, it is clear that new damages rules (and correlative jury trial rights) and restorative laws may in fact be "retroactive" in their application, as they are here, in the sense this Court has defined that term.

b. Joined by the Solicitor General, petitioners also suggest (Pet. Br. 20-22, 27-29, 33-34; U.S. Br. 17-21) that this Court has a long history in its cases of presuming that remedial, procedural and restorative laws are retroactive. But the case law does not support this suggestion.

To begin with, petitioners and the Solicitor General conveniently ignore the fact that, under this Act, jury trial rights do not apply independently of the new damages remedies (and substantive rights) created by Section 101 and, accordingly, that the question whether new jury trial provisions should be presumed to apply retroactively is not separately presented. Likewise, they ignore this Court's clear statement, made over a half century ago, that the rule "[t]hat a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication . . . has been applied by this Court to statutes governing procedure." *United States v. St. Louis, San Francisco & Texas Ry.,* 270 U.S. at 3. Similarly, they ignore the many occasions on which the Court has applied the traditional presumption to procedural or remedial laws. *See, e.g., id.* (statute of limitations); *Magnolia Petroleum Co.,* 276 U.S. at 162-63 (statute determining date from which interest on tax refund may be collected); *Greene,* 376 U.S. at 160 (regulation changing conditions under which monetary restitution was payable). And, finally, petitioners and the Solicitor General do not cite even a single case that purports to hold that a "restorative" law is presumed retroactive.

Equally important, the cases that the Solicitor General and the petitioners in these consolidated cases do cite do not apply a presumption of retroactivity to new damages rules or restorative laws (or, for that matter, to new jury trial provisions). Many of the cited cases involved expressly retroactive laws or laws that drew upon antecedent facts for their operation; the question was generally whether those expressly retroactive laws were constitu-

tional.[11] Other of the cited cases concerned the retroactivity of judicial decisions, which, unlike statutes, are presumed to apply retroactively.[12] Still other of the cited cases concerned the jurisdiction or jurisdictional discretion of the courts,[13] which, as Justice Thomas recently explained, generally does not involve retroactive application of the law and, in all events, "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554, 565-66 (1992) (Thomas, J., concurring). And still other of the cited cases concerned requests for declaratory or injunctive relief against future conduct,[14] which also do not involve retroactive application of law.[15]

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[11] *See, e.g., Sampeyreac v. United States*, 32 (7 Pet.) U.S. 222, 239-40 (1833); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160, 162, 174-75 (1865); *Frisbie v. Whitney*, 76 (9 Wall.) U.S. 187, 189-90, 196-97 (1870); *Cox v. Hart*, 260 U.S. 427, 435 (1922); *United States v. Heinszen & Co.*, 206 U.S. 370, 381-82 (1907); *Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978); *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107, 110 (1801).

[12] *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987).

[13] *See Bell v. New Jersey*, 461 U.S. 773, 777 n.3 (1983); *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978); *Ex Parte Collett*, 337 U.S. 55, 71 (1949) (forum non conveniens statute); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916); *Railroad v. Grant*, 98 U.S. 398, 401 (1879).

[14] *See Cort v. Ash*, 422 U.S. 66, 74 (1975); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921).

[15] Petitioners and the Solicitor General cite a number of other cases that do not fit in these categories but that still do not involve a presumption by this Court that new statutes should apply retroactively. In *Watts, Watts & Co., Ltd. v. Unione Austriaca Di Navigazione*, 248 U.S. 9, 21-23 (1918), the Court simply held that the United States' declaration of war made it inappropriate for a federal court to continue with a proceeding. In *Bonet v. Texas*, 308 U.S. 463, 471 (1940), the Court held only that it could not find "clear or manifest" error in a decision of the Supreme Court of Puerto Rico that a local statute establishing a new procedure for workers' compensation laws applied to pending cases. Finally, in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982), the Court merely "assume[d], *arguendo*," that new amendments applied to a case.

Indeed, only two decisions of this Court—*Bradley v. School Board*, 416 U.S. 696, and *Thorpe v. Housing Authority*, 393 U.S. 268 (1969)—can arguably be cited for the proposition that a new statute may be presumed retroactive—remedial, procedural, restorative, or otherwise. In *Bradley*, the Court held that a new attorney fees statute applied to a case that was pending in the court of appeals at the time of the law's enactment. In *Thorpe*, the Court held that a new regulation, which was promulgated while the case was pending on certiorari and which required housing authorities to inform a tenant of the reasons for an eviction prior to instituting the eviction, should be applied to invalidate an eviction order issued almost eighteen months before the regulation was adopted. In each case, the Court justified its decision by, among other things, stating that a court—or at least an appellate court—must apply the law in effect at the time that it renders a decision.

As Justice Scalia and a number of courts of appeals have concluded, however, a rule of this type is irreconcilable with the traditional rule that statutes are presumed prospective. *See Bonjorno*, 494 U.S. at 855 (Scalia, J., concurring); *see also, e.g., Butts v. City of New York Dep't of Housing Preserv. and Dev.*, 61 Fair. Empl. Prac. Cas. (BNA) 579, 589 (2d Cir. 1993); *DeVargas*, 911 F.2d at 1390; *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374-75 (8th Cir. 1992). Moreover, the Court's decision in *Bennett* expressly rejects the broad sweep of the language in *Bradley* and *Thorpe*, and, in so doing, has arguably "deprived *Bradley* [and *Thorpe*] of [their] substantive content inasmuch as retroactive application is never sought (or defended against) except as a means of 'affecting substantive rights and liabilities' at issue in the litigation." *Bonjorno*, 494 U.S. at 853 (Scalia, J., concurring); *see also id.* at 854. In all events, this Court should make it clear that *Bradley* and *Thorpe* do not justify excepting new remedial, procedural or restorative laws from the traditional presumption of prospectivity.

First, as Justice Scalia explained in his *Bonjorno* concurrence, *id. at* 844-51, *Bradley* and *Thorpe* made no effort to reconcile their holdings or reasoning with the traditional presumption that statutes are applied only prospectively. They do not mention that traditional presumption or discuss any cases in which it was applied. Moreover, as Justice Scalia further explained, the cases that *Bradley* and *Thorpe* cite are entirely consistent with the traditional rule. The Court should hesitate to build exceptions to the traditional rule off of cases that do not even discuss it, let alone provide a reasoned basis for discarding it or departing from it. Indeed, as noted above (at page 45), to do so would conflict with cases that expressly hold that the traditional presumption is applicable, for example, to procedural and remedial laws.

Second, as noted above, in this context, a distinction between substantive behavioral rules, on the one hand, and remedial, procedural or restorative rules, on the other hand, is conceptually and practically unsound. Again, the issue here is *not* whether particular situations justify the enactment of retroactive laws; rather, the issue is what should be *judicially presumed* in the absence of clear legislative direction. Even for new remedial, procedural and restorative laws, a presumption of retroactivity is contrary to the principle that people should have fair warning of the laws against which their conduct will be measured and the sanctions that will be applied to them if they fail to conform. While that principle of justice may be less compelling to some in the context of what they regard as remedial, procedural or restorative laws, it still applies with sufficient force to recommend its use as a default rule of construction that Congress is *free to override*. Moreover, a presumption of retroactivity limited to new remedial, procedural or restorative laws is still entirely inconsistent with the principle of limited government that legislation looks forwards, not backwards, and that the power retrospectively to identify wrongdoers and punish

them is a power that should rarely, if ever, be exercised by the legislature in the course of framing the law. And a presumption of retroactivity for new remedial, procedural and restorative laws, but not for substantive laws, would needlessly increase the work of courts trying to interpret statutes, and inevitably lead to confusion and conflict in the development and administration of the law.

Indeed, the suspect nature of the entire enterprise is confirmed by the "manifest injustice" qualification that petitioners and the Solicitor General concede is necessary for a presumption of retroactivity properly to work. As is clear from their application of it in this case, the "manifest injustice" standard requires nothing less than a judicial rebalancing of the myriad economic, moral, and political considerations that Congress must consider in determining whether retroactive action is justified and desirable in a particular context. Thus, whereas the petitioners in these consolidated cases urge that the Act requires retrial of any cases pending on appeal on the date of enactment, the Solicitor General advises (U.S. Br. 24 n.14) that such retrials would be manifestly unjust where the initial trial went to judgment without error. Likewise, whereas the petitioners in these consolidated cases urge that all of the Act's damages provisions should be applied retroactively, the Solicitor General advises (U.S. Br. 23 n.13) that it may be manifestly unjust to apply the Act's punitive damages provisions retroactively. "[A] rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action." *Bonjorno,* 494 U.S. at 857 (Scalia, J., concurring). Whatever role a rule of discretion might properly play in deciding whether to apply this Court's own decisions retroactively, it seems apparent that such a rule of discretion has no proper role to play in the interpretation of statutes. *See TVA v. Hill,* 437 U.S. 153, 194-95 (1978).

In sum, with all respect, to the extent that they purport to establish a presumption of retroactivity for statutes, *Bradley* and *Thorpe* are unsound at every turn. Contrary to basic principles of justice and limited government through checks and balances, they start with the erroneous premise that retroactivity is the presumptive norm in statutory law. And, contrary to long-standing teaching about the proper role of courts in interpreting statutes, *Bradley* and *Thorpe* seek to moderate this anomalous presumption by improperly turning the law on and off according to individual hardships and reliance interests. This Court should clarify that the language concerning retroactivity in *Bradley* and *Thorpe* does not state the governing law, and that the lower courts should apply all new statutes, including the Civil Rights Act of 1991, prospectively, unless Congress has clearly and unequivocally commanded to the contrary.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it held that the Civil Rights Act of 1991 was not retroactively applicable to this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. THE 1991 CIVIL RIGHTS ACT ITSELF MAKES CLEAR THAT § 101 APPLIES HERE

A. The Statute's Text and Structure Support Application of § 101

The central statutory construction question relating to the applicability of the Civil Rights Act of 1991 is what meaning to give to § 402(a). Respondents urge the Court to abandon any effort to divine meaning from the language of the statute. They argue that each of the key statutory provisions which bear on the statute's applicability — § 402(a), § 402(b) and § 109(c) — is devoid of meaning. Evaluated under normal principles of construction, however, these provisions are certainly as clear as the provisions this court has readily construed in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), and other cases.

Roadway's only argument that the Act makes § 101 inapplicable is that the phrase "take effect upon enactment" was routinely interpreted to apply only to conduct and trials occurring after enactment. Roadway Br. at 15. The six court of appeals decisions upon which Roadway relies in support of this assertion simply do not hold that such language means that a statute is not to be applied to pending cases. On the contrary, four of Roadway's cited cases expressly assert that such language did *not* resolve the question of applicability of the statutes at issue. The other two of Roadway's cases rely on *different* statutory language not present in the 1991 Act in addition to the general effective date provision. See Appendix B. Based on these cases, a Congress presumed to know the existing law would have no basis whatsoever to assume that "take effect upon enactment" means that the statute shall not apply to pre-Act conduct.

In *Weaver v. Graham*, 450 U.S. 24 (1981), another case upon which Roadway relies, this Court held that language requiring application of new statutory provisions "on the

effective date of the act" must be read to mean that new provisions *did* apply to pre-Act conduct. In *Weaver*, this Court considered whether a Florida statute diminishing gain time earned by convicted prisoners by its express terms applied to gain time earned pre-enactment. The Court determined that the statute on its face "[c]learly" would apply "to prisoners convicted for acts committed before the provision's effective date." *Id.* at 31.[1] Thus, under *Weaver* the Court could, based on the language of § 402(a) alone, construe § 101 to apply to pending cases addressing pre-Act discrimination.

In addition to § 402(a), the sections excepting certain pre-Act cases and conduct from the general rule — §§ 402(b) and 109(c) — support petitioner's position that the Act expressly applies. These exceptions must be read under established canons to (i) have a meaning *different* from (rather than redundant of) § 402(a) and[2] (ii) describe the *only* situations receiving the specific treatment they demand.[3]

The existence of specific exceptions suffices to make clear the underlying rule even under the exacting standard

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[1] Once it determined that the statute would apply, the Court then proceeded to determine that the gain-time amendment violated the *ex post facto* clause, but in doing so the Court expressly distinguished its analysis under the *ex post facto* clause from "the test for evaluating retrospective laws in the civil context." *Id.* at 29, n. 13.

[2] See Appendix C (listing Supreme Court cases relying on the anti-redundancy canon).

[3] See Appendix D (listing Supreme Court cases relying on the canon that the inclusion of one thing implies the exclusion of others ("expressio unius est exclusio alterius"), including two during 1993).

applied in Eleventh Amendment cases.[4] In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court was faced with precisely the same kind of indicia of intent that petitioners point to here, and it held that those indicia sufficed to show that CERCLA subjected the states to suit in federal court. Under CERCLA, the general definition of "owners and operators" was held to be ambiguous standing alone, *id.* at 8, n. 2, but an exception that excluded states from liability under certain circumstances made clear that states were otherwise subject to suit. That exception acted as "an express acknowledgement of Congress' background understanding ... that States would be liable in any circumstance ... from which they were not expressly excluded." *Id.* at 8.

The substance of the Civil Rights Act supports petitioners' interpretation of § 402(a). Under Roadway's view, §§ 402(b) and 109(c) are redundant, and Roadway implies that but for errors in final drafting these provisions would have been eliminated. Roadway Br. at 23. On the face of the statute, however, it makes sense that Congress chose to bar application of the Act to pending cases only with regard to §§ 109(c) and 402(b). While most of the 1991 Act is procedural and remedial, § 109(c), in contrast, clearly made illegal under Title VII conduct which had previously been wholly legal. Section 402(b), which only makes the Act inapplicable to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), was arguably a targeted effort to put to rest a

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[4] The proper standard of clarity according to which the 1991 Act should be read is not a clear-statement rule, but the standard this Court employed in *Bonjorno*. Under *Bonjorno*, whether the statute's "plain language" requires that it be applied to pending cases is determined by "the most logical reading of the statute," 494 U.S. at 839, 838, which may be "[i]mplicit," *id.*, 839, and need not be "clear and unequivocal," as Roadway asserts.

case in which, after sixteen years of litigation, plaintiffs had not established any liability.[5]

Roadway and USI Film Products are, in effect, arguing that they, too, should have been included in the statute's two express exceptions and obtained the same treatment as defendants in cases by United States nationals abroad under § 109(c) and the *Wards Cove* case under § 402(a). Roadway contends that the change made by § 101 is like the change made by § 109, even though for Roadway, unlike for ARAMCO, the discrimination alleged was illegal all along under Title VII, and § 101 has no subsection like § 109(c) limiting its applicability. USI Film Products contends that providing for new remedies is unfair in a case filed in 1989, but the change made by § 402(b) expressly drew a different line, finding unfairness only in applying the Act to old cases in which "a complaint was filed before March 1, 1975." It is thus respondents themselves, not petitioners, who are "waging in a judicial forum a specific policy battle which they ultimately lost." USI Film Products Br. at 16-17, *quoting Chevron US, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984).

Respondents seek to undercut the "most logical reading" of the statute by reference to legislative history. But where the language is reasonably clear, legislative history must not be relied upon to create ambiguity. *United States v. McMann*, 434 US 192, 199 (1977). After the language of the Act was agreed upon, statements were made on the floor of the Senate expressing conflicting views on its meaning. Prior to enactment, however, the vast majority of voting members expressed no position at all about the meaning of the effective date provisions, and all that is known about most

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[5] The constitutionality of § 402(b) has been challenged in the *Wards Cove* case.

members' views is that they approved the statute's text. This is why the text should be given controlling effect.

B. The Identity Between § 1981 Prior to *Patterson v. McLean Credit Union* and As Amended By § 101, and the Virtually Unanimous Acknowledgment in Congress of that Identity, Confirm that § 101 is Restorative

Respondents concede that, if Congress intended § 101 to be restorative, such intent would be evidence in favor of application of the section to existing cases: "To be sure, the 'restorative' purpose of a law ... may provide a suggestion of Congress' intent to act retroactively." Roadway Br. at 43. That § 101 both was restorative and was intended to be is made evident by a simple comparison of the state of law prior to *Patterson v. McLean Credit Union* and after the Civil Rights Act of 1991. It was well established prior to this Court's *Patterson* decision that § 1981 generally covered discrimination in all aspects of employment. In addition to this Court's repeated assumption that § 1981 covered discharge, and the Sixth Circuit's numerous holdings to that effect,[6] the nearly 200 cases listed in Appendix E show that prior to *Patterson* § 1981 was overwhelmingly construed to cover discrimination in every aspect of employment now included in § 101.[7]

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[6] *See* Petitioners' Br. at 28, nn. 29, 28.

[7] Defendants' assertion that "the law under Section 1981 was in a state of flux," Roadway Br. at 30, is completely refuted by the hundreds of cases holding § 1981 applicable to all aspects of employment. Virtually every federal judge in the United States who dealt with the issue prior to *Patterson* held that § 1981 prohibited discriminatory discharge. In every area of the law, no matter how settled, there is always some disagreement. But the two lone district court cases upon which Roadway relies do not change the reality that § 1981 was interpreted prior to *Patterson* to have

(continued...)

The overwhelming majority of the members of Congress who spoke about the provision that was finally enacted as § 101 characterized it as restorative. Appendix F (listing references to § 1981 as rejecting *Patterson* to restore prior law).[8]

II. THIS COURT SHOULD REAFFIRM *BRADLEY V. RICHMOND SCHOOL BOARD*, AND APPLY § 101 HERE

If the statutory language is held to be unclear, the question is what default rule of statutory applicability governs: the established rule of *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), that new statutes generally do apply, or a new rule purposed by respondents under which they might not. Roadway urges the Court to overrule *Bradley* and

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[7](...continued)
the same coverage as it does amended by § 101. The court in *Minority Police Officers v. City of South Bend*, 617 F. Supp. 1330, 1352, n. 52 (N.D.Ind. 1985), was uncertain whether even the Fourteenth Amendment prohibited intentional race discrimination in public employment. The court in *Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F. Supp. 752, 757, n. 5 (W.D.Mo. 1986), actually acknowledged the prevailing assumption that Title VII and § 1981 "run parallel, except for the more liberal damage potential of § 1981," and cited circuit court precedent to that effect.

[8] The fact that the statute as it was enacted says that it "expands" and provides "additional" protections is not inconsistent with its restorativeness, nor is President Bush's reference to "expanded protections." Viewed relative to the law immediately prior to passage of the Act in 1991, the law did "expand" and "add" to § 1981 beyond the contours *Patterson* accorded it. Viewed relative to the law as it stood prior to *Patterson*, however, the 1991 Act restored § 1981. This wording does not in any way affect the universality of congressional opinion that § 101 was, and was meant to be, restorative, and the necessary conclusion that § 101 should be applied here.

Thorpe. Respondents rely primarily on the concurring opinion of Justice Scalia in *Bonjorno*. Under Justice Scalia's rule, new laws should be presumed to apply to pending cases only where such application is deemed to be "prospective," but not where it would have a "retroactive" effect. 494 U.S. at 841. Because the rule urged by Justice Scalia is contrary to established law and is entirely unclear in scope, this Court should reaffirm *Bradley*.

A. The Default Rule Respondents Advocate Would Require the Courts to Make Difficult and Unguided Distinctions Between New Statutes that Apply to Pending Cases and New Statutes that Do Not

Notwithstanding important disagreements about the proper default rule, the parties agree about at least two points: First, all agree that laws which render illegal conduct which was legal when it was engaged in, or which eliminate vested rights (such as property interests or accrued causes of action), presumptively apply only to conduct occurring after the new rule is adopted. Under Justice Scalia's rule, application of new laws under these circumstances would be among the types of conduct labelled "retroactive." Under *Bradley*, such application would be manifestly unjust.

The second point of agreement is that there is *some* category of new laws which presumptively do apply to pre-enactment claims. Justice Scalia proposes to define the word "retroactive" in such a way that application of some new laws to pending cases would not be labelled "retroactive."[9] Such

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[9] Roadway asserts that Rivers and Davison committed semantic suicide by conceding that application of § 101 should be labelled "retroactive," Roadway Br., at 13, but this assertion is simply false. Petitioners in their brief, including at the pages cited by Respondent,
(continued...)

non-retroactive applications arguably include the attorneys' fees statute at issue in *Bradley*,[10] as well as at least some procedural and other rules.[11] Under *Bradley*, the category of cases in which applications of new laws is presumptively correct includes all laws the application of which would not produce a manifest injustice, which has consistently been understood to refer to changes in procedural and remedial laws. *See* Appendix G. In essence, what the parties agree about is simply that there are two categories of new laws — those which presumptively apply to pending cases, and those which presumptively do not. The dispute here concerns where to draw the line between those two categories.

Respondents and Justice Scalia attack *Bradley*'s manifest injustice exception as a mechanism by which "[a] rule of law, designed to give statutes the effect Congress intended, has . . . been transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action." *Bonjorno*, 494 U.S. at 857, *cited in* Roadway's Br. at 49. This contention is baseless, for at least two reasons:

First, the lower federal courts have implemented this standard for over a century. The experience of the lower

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[9](...continued)
consistently pose the question as whether § 101 applies to their pending claims, not as whether § 101 should be given "retroactive" effect. *E.g.* Petitioners' Br. at 9, 14.

[10] *See Bonjorno*, 494 U.S. at 849 (Scalia, J., concurring).

[11] *See, e.g.* Brief for the American Trucking Associations, *et al.*, as Amici Curiae Supporting Respondents, at 18 (stating that "it may be that most procedural changes are unlikely to have any retroactive effect (*i.e.* to change the consequences of prior conduct) and may routinely be applied to pending cases.... Application of such changes to pending cases have [sic] only prospective effects").

courts has established a clear and workable distinction between procedural and remedial changes in the law on one hand and changes affecting vested rights or substantive standards of conduct. *See* Appendix H; Appendix G. The principal source of confusion is Justice Scalia's own assertion in his concurrence in *Bonjorno* that *Bradley* was an aberration. *See e.g.*, Appendix to Petition for Certiorari in *Landgraf v. USI Film Products, Inc.*, No. 92-757 (listing cases applying and not applying the 1991 Civil Rights Act to pending cases).

Second, this Court itself commonly uses a virtually identical "justice" standard in its orders instructing lower courts when to apply new rules to pending cases, presumably finding it to be a clear standard for application of new rules to pending cases. *See* Appendix I (listing orders applying new rules to pending cases "insofar as just and practicable", or unless doing so "would not be feasible or would work injustice"). Justice Scalia himself has approved at least four such orders, including one on April 17, 1990 — just two weeks before the *Bonjorno* decision.

In place of the rule reaffirmed in *Bradley*, which has been administered by the lower courts for over a century without difficulty, Justice Scalia proposes an entirely new rule. Justice Scalia's rule will turn on an as-yet-to-be articulated definition of the term "retroactive." Justice Scalia himself concedes that adoption of his rule would "not ... always make it simple to determine the application in time of new legislation." *Id.* at 857. Among the admitted problems with his proposed approach is that "[i]t will remain difficult, in many cases ... to decide whether a particular application is retroactive." *Id.* Respondents and their *amici* repeatedly assert that Justice Scalia's rule is a clear, "bright-line" rule. On the contrary, it is an unexplained rule with unforeseeable consequences.

Respondents and Justice Scalia urge that the rule against "retroactivity" in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), applies to changes in procedural and remedial laws. *Bowen* held that "retroactive" rules could not be promulgated without express statutory authority, but this holding cannot include procedural and remedial rules. Despite *Bowen*, and the absence of express authorization for retroactive rulemaking in the Rules Enabling Act,[12] this Court has itself consistently ordered that amendments to the Federal Rules be applied in pending cases. *See* Appendix I (listing United States Supreme Court Orders applying new rules to pending cases). These orders would be entirely inconsistent with *Bowen* unless *Bowen*'s dictate against "retroactivity" did not extend to procedural changes in governing law, but rather comported with *Bradley* in presuming that such changes are applicable in pending cases.

Even under Justice Scalia's rule against retroactive application of new laws, § 101 should be applied here because the changes that § 101 would cause in this case are not "retroactive." Rivers and Davison seek application of § 101's procedures and remedies in a trial which has not yet occurred. As explained in our opening brief, what is at stake here is whether the right to a jury trial and damages under § 1981 as amended by § 101 will apply in a retrial of plaintiffs' discharge claims on a remand for a trial on these claims that will occur in any event. Pet. Br., at 9. Whether a jury will hear the discharge claims is a question that relates to procedures for conducting a trial in the future. Similarly, if the jury finds liability on the discharge claim, whether that

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[12] 28 U.S.C. § 2027(a) grants the Court "power to proscribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals." It includes no express grant of power to apply new rules retroactively.

jury will calculate only the extent of lost wages, or whether it will also compensate for other harm the discrimination caused the plaintiffs, is a question relating to the standard for a decision that the jury has yet to make. Thus, under either rule, § 101 should apply.

B. *Bradley* Was Consistent With Prior Law

In his concurrence in *Bonjorno*, Justice Scalia argued that *Bradley* was inconsistent with prior decisions. As we set forth below and in related Appendices, *Bradley* was in fact fully consistent with the law prior to 1974. In reading decisions prior to *Bradley*, it is important to bear in mind that the way in which the courts used the term "retroactive" changed over time. In the nineteenth century, the courts generally used the term "retroactive" to refer only to those laws which they believed should not apply to pre-enactment claims. The courts labelled "retroactive" laws which, if applied, would have eliminated accrued causes of action or impaired vested rights. Application of new remedial and procedural laws was termed "prospective," or "non-retroactive." "Retroactive" was then, much like "ex post facto" is today, a conclusory label applied to those categories of statutes which the courts believed did not properly apply to pending cases.

The traditional prohibition against "retroactive" laws is consistent with *Bradley* as elaborated in *Bennett*. See Petitioners' Br. at 39-45. It was when the courts began to use the term "retroactive" to refer more generally to *any* application of new law to pending cases that the default rule was properly articulated as *favoring* retroactive application of new laws in certain circumstances. *See, e.g., Larkin v. Saffarans*, 15 F. 147, 150 (C.C. W.D. Tenn. 1883) (remedial laws); *Bowles v. Strickland*, 151 F.2d 419, 420 (5th Cir. 1945) (procedural laws). In sum, a rule recognizing the distinction between applicability of new substantive laws and new

procedural or remedial changes has been made consistently for more than a century, and all that has changed is the language used to describe that rule.

1. Supreme Court Cases

We set forth in our opening brief Supreme Court cases preceding *Bradley* which held that changes in procedural and remedial rules presumptively apply to pending cases. Pet. Br. at 31-36. We set forth below other authorities.

2. Court of Appeals Decisions

For almost a century prior to *Bradley*, and for the two decades since, the lower federal courts consistently recognized and regularly implemented a distinction between changes in substantive obligations and changes in remedies or procedures. One of the earliest decisions observed that the presumption in favor of application of procedural and remedial rules to existing claims was "in accordance with the general rule that all remedial legislation shall be liberally construed, and particularly should this be so where new remedies are given." *Larkin v. Saffarans*, 15 F. 147, 150 (C.C. W.D. Tenn. 1883). That presumption in favor of applying changes in procedure was understood to refer broadly to "the procedural machinery provided to enforce" existing rights. *Bowles v. Strickland*, 151 F.2d 419, 420 (5th Cir. 1945). The distinction between the two presumptions was, as one court put it, "settled rule" long before *Bradley*. *Dargel v. Henderson*, 200 F.2d 564, 566 (Em. Ct. App. 1952). Among the pre-*Bradley* circuit court opinions on this issue, there does not appear to be a single dissent. Under this long-established distinction, statutes providing for more complete relief for conduct that was already actionable were construed to apply to pending claims. *See* Appendix H.

3. Treatises

Justice Scalia in *Bonjorno* quotes Chancellor Kent's

statement that "it cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed." *Bonjorno*, 494 U.S. 855 (Scalia, J., concurring), *quoting* J. Kent, *Commentaries on American Law* *455. But Chancellor Kent goes on to explain that his objection is to a law "affecting and changing vested rights," and emphasizes that the doctrine quoted by Scalia

> is not understood to apply to *remedial* statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy ... adding to the means of enforcing existing obligations.

Commentaries on American Law at *455-*456 (Emphasis added). Justice Scalia also quotes Justice Story's statement that

> retrospective laws are ... generally unjust; and ... neither accord with sound legislation nor with the fundamental principles of the social compact.

108 L. Ed. 2d at 856, quoting J. Story, *Commentaries on the Constitution*, § 1398 (1851). Respondents rely on the same quotation. Roadway Br. at 9. But Justice Story himself *defined* "retrospective law" not to refer to any new statute affecting pending cases, but as a

> statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a disability, in respect to transactions or considerations past.

Society v. Wheeler, 2 Gall. 139 (1814). Over a century ago the Supreme Court read Justice Story's definition to mean that a

statute providing a new *remedy* to enforce an existing right was not, even as applied to a pre-Act violation, a "retroactive law." *Sturges v. Carter*, 114 U.S. 511, 519 (1885). By the end of the nineteenth century, treatises uniformly made this distinction. *See* Appendix I. The article by Instructor Smead on which Justice Scalia and Respondents relied is expressly about statutes which, if applied in pending cases, would eliminate vested rights.[13]

4. State Constitutions and Laws

Justice Scalia noted in *Bonjorno* that a number of state constitutions contain express prohibitions against "retroactive" laws. 494 U.S. at 856. These state provisions have long been construed, however, in a manner consistent with pre-*Bradley* federal decisional law, *not* to forbid new legislation at provided different remedies or procedural mechanisms to enforce pre-existing obligations. *See* Appendix K. Cases from other states also support the distinction upon which petitioners rely. *See* Appendix L. Judge Kent's opinion in *Dash v. Van Kleck* is expressly limited to statutes which alter vested rights. 5 Am. Dec. 291, 308, 309, 310, 312 (1811) (opinion of Kent, J.); *see also*, *id*. at 302, 303, 306 (opinion of Thompson, J.).

5. English Cases

Respondents contend that their rule "has an ancient lineage," Roadway Br. at 9, but it is clear that the distinction between statutes altering standards of conduct or vested rights and statutes affecting procedures and remedies for enforcing those standards and rights was established in Great Britain by the mid-nineteenth century. The leading case was *Wright v. Hale*, 6 Hurl. & Norm. 226 (Ct. Exchequer 1860),

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[13] Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 781, n. 22 (1936).

which applied to pending cases a newly enacted statute limiting awards of costs. Baron Pollock explained that "[t]here is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts.... Rules as to the costs to be awarded in an action are of that description, and are not matters in which there can be vested rights."[14] English common law does not support the rule respondents advocate, which would reject application of any new rule that alters a party's expense associated with past conduct.

6. Prior Views of Respondent's Counsel

Counsel for Respondent Roadway argues with great force that *Bradley* is bad law, and has been repudiated by the Supreme Court in cases such as *Bowen* and *Bennett*. The same counsel told the Senate in May 1990, however, precisely the opposite. He described *Bradley* as governing law under

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[14] 6 Hurl. & Norm. at 230-31; see also *id*. at 231-32 (Channel, B.) ("In dealing with acts of parliament which would have the effect of taking away rights of action, we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature; but the case is different where the Act merely regulates practice and procedure"); *Kimbray v. Draper*, 3 Q.B. (L.R.) 160, 163 (Q.B. 1868) (Blackburn, J.) ("When the effect of an enactment is to take away a right, prima facie it does not apply to existing rights; but where it deals with procedure only, prima facie it applies to all actions pending as well as future"); *Towler v. Chatterton*, 6 Bing. 258 (Ct. Com. Pleas. 1829) (applying to pending case new statute regarding evidence needed to place case outside limitations period); *Cox v. Thomason*, 2 C. & J. 498 (Ct. Exch. 1832) (applying to pending case new rule of court regarding taxation of costs). In *Freeman v. Moyers*, 1 A. & E. 338 (K. B. 1834), (holding applicable to pending cases a new statute rendering certain unsuccessful plaintiffs liable for costs).

which, as petitioners here contend, new laws that affect procedures and remedies are presumptively applicable to pending litigation. *See* Appendix M.

C. Section 101's Remedial and Procedural Nature is Unaffected By Whether § 1981 is "A Distinct Positive Law" From Title VII

Roadway does not contend that discriminatory discharge was legal at the time it fired Rivers and Davison. Because race discrimination in any aspect of employment, including discharge, was prohibited under Title VII when Roadway discharged Rivers and Davison, applying § 101 here to authorize a jury trial and damages for the discharge claim simply applies additional remedies and procedures for conduct which has at all times been illegal. Whether § 1981, as amended by § 101, is a "separate" or "distinct positive" law from Title VII does not affect the fact that application of § 101 here is remedial. *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. at 8, n. 2 (reading separately enacted legislation "*in combination*") (emphasis in original). The location of the codification of § 1981 and Title VII in the statute books is not determinative of whether application of the § 101 jury trial and damages provisions in this case is remedial.[15]

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[15] Even if where § 101 is codified *were* determinative, § 101 is properly viewed as remedial of discrimination prohibited by Title VII. Title VII and § 1981 are both codified in Chapter 21 of Title 42 of the United States Code. Section 101 is codified as § 1981(b). The 1991 Act expressly recognizes the interrelationship between § 1981 and Title VII by codifying the new Title VII damages provisions at § 1981A. Roadway's position is thus reduced to a contention that plaintiffs could prevail only if Congress had *also* moved § 2000e-5(a) of Title VII to make it part of § 1981. Only the most arbitrary and unworkable doctrine would make such a detail of statutory compilation determinative of whether § 101 applies to pending discrimination claims.

The federal courts have overwhelmingly rejected Roadway's reasoning that, where the substantive conduct at issue was prohibited when engaged in, a new remedy does not apply if the preexisting prohibition was established by a different law from that in which the remedy was announced. *See* Appendix N. The very cases upon which Roadway relies support the conclusion that § 101 provides additional remedies for employment discrimination which Title VII also prohibits. *See* Roadway Br. at 27-29. For example, this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), characterized § 1981 as "a remedy," *id.* at 466, and referred to Title VII as conferring "remedies" that are co-extensive with § 1981, *id.* at 459, and to Title VII and § 1981 as "two procedures" for enforcing the same rights. *Id.*[16] *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), similarly emphasized that legislative enactments in the nondiscrimination area, specifically including Title VII and § 1981, "have long evinced a general intent to accord parallel or overlapping *remedies* against discrimination." *Id.* at 47.

Roadway mischaracterizes the issue presented by this case when it asks whether § 101 should be applied to "conduct which was adjudicated to be non-discriminatory prior to the date on which Section 101 became law," Roadway Br. at i, or to "trials occurring before the date of its enactment." Id. at iii, iv, 8, 13, 26; *see id.* at 14. The question is not whether § 101's new remedies could *require* a new trial of claims that were properly tried under pre-Act law, but

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[16] *See e.g. Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (referring repeatedly to the different "remedies" and the "procedures" § 1981 and Title VII provide for the same conduct); *United States v. Burke*, 112 S.Ct. 1867, 1873 (1992) (explaining that "the circumscribed *remedies* available under Title VII stand in marked contrast ... to those available ... under other federal antidiscrimination statutes....") (emphasis supplied).

whether § 101 should be applied to a new trial which will occur in any event, without regard to whether § 101 applies.[17]

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[17] Although it declined to apply § 101, the Sixth Circuit remanded the § 1981 retaliatory discharge claim for trial on the ground that the district court's dismissal of that claim turned on a misapplication of *Patterson*. On remand, the jury — to which plaintiffs are already entitled on the retaliation claim under *Patterson*, even apart from § 101 — may find that Roadway did discriminate against the plaintiffs in their efforts to enforce their contract rights. If the jury so finds, then the district court's factual finding of non-discrimination under Title VII cannot collaterally estop the jury's verdict, but will have to be vacated and a new Title VII judgment entered consistent with the jury's verdict. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), *cited in Harvis v. Roadway Express*, 973 F.2d 490, 495 (6th Cir. 1992), P.A. 9a-10a. Respondents did not raise for consideration by this Court any issue of collateral estoppel. *Cf. Leatherman v. Tarrant County*, 113 S. Ct. 1160, 1162 at n. 1 (1993).

Roadway suggests that the district court's Title VII determination on the claim of discriminatory discharge would not be reopened because "the court of appeals did not purport to remand on those claims; it remanded only on the retaliation claims." Roadway Br., at 4 n. 1. As the Court of Appeals recognized in its opinion, however, if the jury's determination on the common issues of fact relating to racial motive differs from the judge's, the Seventh Amendment requires that the jury's determination prevail. The district court will then have to vacate the inconsistent Title VII determination. If the 1991 Act applies here, the jury will determine the discharge claim as well as the retaliation claim, and determine the propriety of damages on each; if not, the court will enter a judgment on discharge. It is thus not a "free-standing jury trial right," Roadway Br. at 35, which Rivers and Davison assert, but a right to have a jury on claims when those claims are to be adjudicated in any event.

The appellate court's failure to vacate the Title VII judgment does not affect plaintiffs' rights under *Lytle*. It could well have been considered premature for the court of appeals, rather than the district court on remand, to vacate the Title VII judgment. If the jury decides that no discrimination occurred, the Title VII judgment need not be disturbed.

III. THIS COURT SHOULD NOT RETROACTIVELY CHANGE RULES ABOUT STATUTORY APPLICABILITY UPON WHICH CONGRESS HAS RELIED

There is probably no area of the law where *stare decisis* is of such practical importance, and so vital to preserving the proper balance between Congress and the courts, as the rules of statutory construction. The rules of construction are a critical part of the context in which Congress legislates; they control the terms, syntax and structure which Congress must use to achieve a desired result. Changing a rule of construction would be as disruptive of the law-making process as a decision to change by judicial fiat the meaning of a word commonly used in federal statutes. The truism that Congress is presumed to legislate with a knowledge of the law is particularly important, and realistic, with regard to the principles of statutory construction.

Over the course of the last two decades, congressional reports and individual members of Congress have repeatedly referred to *Bradley* as establishing the rule of interpretation regarding pre-Act claims. *See* Appendix O. Since 1974, Congress has enacted more than 5000 Public Laws encompassing 40,000 pages of Statutes at Large. Stat. at Large, vols. 89-106. In the vast majority of these statutes, Congress chose not to attempt to specify expressly which provisions would and would not apply to pre-existing cases, but decided instead to let that issue be determined through judicial application of established legal principles. To now alter the rules of interpretation applicable to those statutes would wreak havoc with the intent and expectations of Congress.

Bradley has proved to be a highly accurate method of ascertaining congressional intent. Despite the frequency with which this issue has arisen in the courts, it appears that

Congress has never overturned by legislation any of the circuit court decisions before or after *Bradley* regarding the applicability of particular statutes to pre-Act claims. Justice Scalia's concurrence in *Bonjorno* now proposes, paradoxically, that the Court announce — and apply retroactively — a new rule against the retroactive application of new rules.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it did not apply the Civil Rights Act of 1991 petitioners' pending claims.

Respectfully submitted,

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APPENDICES

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K Colorado, Montana, New Hampshire, and Ohio Cases Interpreting the Respective State Constitutional Provision Prohibiting "Retroactive" Statutes

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APPENDIX B

Appellate Decisions Upon Which Respondents Rely Construing "Take Effect Upon Enactment"

Court held phrase did not resolve applicability:

1. *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 529 (4th Cir.) *cert, denied*, 112 S. Ct. 417 (1991) (giving credence to *Bradley* and analyzing question without regard to statutory language about application upon enactment, but rather concluding that *no* congressional intent "is discernible from []either the language of the amendment itself []or from any other indication of congressional intent")

2. *Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 409 (5th Cir. 1980) (relying on *Bradley* and holding "we do *not* find the statement that the amendment prohibiting involuntary retirement before age sixty-five shall take effect upon enactment dispositive") (emphasis added).

3. *Sikora v. American Can Co.*, 622 F.2d 1116, 1120 (3rd Cir. 1980) (citing *Bradley* in its exposition of the law and stating "we turn to the statute under consideration and find its *language equivocal*. Congress simply provided that the amendment prohibiting involuntary retirement before age 65 'shall take effect on the date of enactment of this Act...'") (emphasis added).

4. *Yakim v. Califano*, 587 F.2d 149, 150-51 (3rd Cir. 1978) (relying on *Bradley* in holding that language in § 20 directing that statute take effect on the date of enactment gives "*no* explicit direction on the retroactivity issue," and proceeding to determine that

it was a different statutory subsection, § 15(c) which "indicat[ed] that Congress was aware of the retroactivity problem and decided to limit such effect to those cases eligible for a fresh review under the Reform Act")(emphasis added).

Court also relied on different statutory language:

5. *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1140 (4th Cir. 1980) (citing *Bradley*, but deciding based on text that the Pregnancy Discrimination Act, which in addition to stating that it shall take effect upon enactment states that it "shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act," is inapplicable where it would impose liability for actions under a fringe benefit program which occurred 7 years prior to the Act).

6. *Schwabenbauer v. Board of Education*, 667 F.2d 305, 310 n. 7 (2d. Cir. 1981) (relying on *Condit* and the same additional statutory language considered there in order not to apply the Pregnancy Discrimination Act where it would have "invalidated past conduct").

APPENDIX C

United States Supreme Court Decisions
Applying the Canon of Construction that
No Word in a Statute Should be Read to be Redundant

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1. *Sale v. Haitian Centers Council Inc.*, 113 S. Ct. 2549 (1993)

2. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992)

3. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60 n.8 (1988)

4. *Mackey v. Lanier Collection Agency and Serv., Inc.*, 486 U.S. 825, 837 (1988)

5. *Kungys v. United States*, 485 U.S. 759, 778 (1988)

6. *Mountain States Tel. and Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)

7. *Securities Industry Ass'n v. Bd. of Governors of Federal Reserve System*, 468 U.S. 207, 165 (1984)

8. *Jewett v. Commissioner of Internal Revenue*, 455 U.S. 305, 315 (1982)

9. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)

10. *Colgrove v. Battin*, 413 U.S. 149, 184 (1973)

11. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)

12. *Shapiro v. United States*, 335 U.S. 1 (1948)

13. *Singer v. U.S.*, 323 U.S. 338, 344 (1945)

14. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)

15. *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879)

APPENDIX D

United States Supreme Court Decisions Recognizing the Canon of Construction "Expressio Unius Est Exclusio Alterius"

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1. *Crosby v. United States*, 506 U.S. ___, 122 L Ed. 2d 25, 30 (1993)

2. *Leatherman v Tarrant County*, 507 U.S. ___, 122 L. Ed. 2d 517, 524 (1993)

3. *Sullivan v. Hudson*, 490 U.S. 877, 891-93 (1989)

4. *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988)

5. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 600 (1987)

6. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983)

7. *Becker v. United States*, 451 U.S. 1306, 1309 (1981)

8. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 30 n.6 (1979) (White J., dissenting) (criticizing the majority for implicitly applying the canon, but recognizing the canon except where it would constrict a statute's remedial purpose)

9. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978)

10. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)

11. *Evans v. Newton*, 382 U.S. 296, 311 (1966) (White J., concurring)

12. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958)

13. *Wilko v. Swan*, 346 U.S. 427, 434 n.18 (1953)

14. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943)

15. *Neuberger v. Commissioner of Internal Revenue*, 311 U.S. 83, 88 (1940)

16. *Ford v. United States*, 273 U.S. 593, 611 (1927)

17. *United States v. Barnes*, 222 U.S. 513, 518-19 (1912)

18. *Bend v. Hoyt*, 38 U.S. 263, 271 (1839)

19. *United States v. Arredondo*, 31 U.S. 691, 724-25 (1832) (applying the canon).

APPENDIX E

Lower Federal Court Decisions Prior to *Patterson v. McLean Credit Union* Interpreting 42 U.S.C. § 1981 to Cover All Conduct Covered by § 1981 as Amended By § 101 of the Civil Rights Act of 1991

FIRST CIRCUIT

Oliver v. Digital Equipment Corp., 846 F.2d 103 (1st Cir. 1988) (discharge; harassment; terms and conditions).

Rowlett v. Anheiser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) (discharge; retaliation).

Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987) (discharge).

Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980) *cert. denied* 449 U.S. 893 (1980) (promotion denial).

DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980) (discharge; harassment)

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (hiring; recruitment)

Townsend v. Exxon Company, U.S.A., 420 F. Supp. 189 (D.Mass. 1976) (refusal to rehire; discharge)

SECOND CIRCUIT

Tach v. Chemical Bank, 849 F.2d 775 (2nd Cir. 1988) (retaliatory discharge).

Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987) (constructive discharge; harassment).

De Cintio v. Westchester County Medical Center, 821 F.2d 111 (2d Cir. 1987) (retaliation; discharge).

Hill v. Coca-Cola Bottling Co. of N.Y., 786 F.2d 550 (2d Cir. 1986) (discharge).

Martin v. Citibank, N.A., 762 F.2d 212 (2nd Cir. 1985) (discharge).

Grant v. Bethlehem Steel Corp., 622 F.2d 43 (2d Cir. 1980) (retaliation).

Hudson v. International Business Machines, Inc., 620 F.2d 351 (2d Cir. 1980) *cert. denied*, 449 U.S. 1066 (1980) (retaliation).

Powell v. Syracuse University, 580 F.2d 1150, *cert. denied* 439 U.S. 984 (1978) (2d Cir. 1978) (discharge).

Brown v. Ralston Purina, 557 F.2d 570 (2d Cir. 1975) (discharge).

Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976) (discharge; promotion denial).

DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975). (discharge; retaliation).

Williams v. State University of N.Y., 635 F. Supp. 1243 (E.D.N.Y. 1986) (discharge).

Almendral v. New York State Office of Mental Health, 568 F. Supp. 571 (S.D.N.Y. 1983) *aff'd in relevant part*, 743 F.2d 953 (2d Cir. 1984) (promotion denial; discharge; retaliation)

Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 414 (S.D.N.Y. 1979) (hiring; terms and conditions; promotion denial).

Patterson v. United Federation of Teachers, 480 F. Supp. 550 (S.D.N.Y. 1979) (failure to represent).

Williams v. Interstate Motor Freight System, 458 F. Supp. 20 (S.D.N.Y. 1978) (discharge).

Lee v. Bolger, 454 F. Supp. 226 (S.D.N.Y. 1978) (promotion denial).

THIRD CIRCUIT

Kelly v. Tyk Refractories Co., 860 F.2d 1188 (3rd Cir. 1988) (discharge; constructive discharge).

Roebuck v. Drexel University, 852 F.2d 715 (3rd Cir. 1988) (failure to grant tenure).

Lewis v. University of Pittsburgh, 725 F.2d 910 (3rd Cir. 1983) *cert. denied* 469 U.S. 892 (1984) (promotion denial).

Wilmore v. City of Wilmington, 699 F.2d 667 (3rd Cir. 1983) (promotion denial).

Walton v. Eaton Corp., 563 F.2d 66 (3rd Cir. 1977) (discharge; harassment)

Wilson v. Sharon Steel Corp., 549 F.2d 276 (3rd Cir. 1977) (discharge; terms and conditions).

Commonwealth of Pa. v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. 1975) (hiring).

FOURTH CIRCUIT

Sharma v. Lockheed Engineering & Mgmt. Services, Co., Inc. 862 F.2d 314 (4th Cir. 1988) (discharge).

Hughes v. International Business Machines Corp., 848 F.2d 185 (1988) (promotion denial; terms and conditions)

Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496 (4th Cir. 1988) (promotion denial; terms and conditions).

Crawford v. College Life Insurance of America, 831 F.2d 1057 (4th Cir. 1987) (discharge)

McCausland v. Mason County Board of Education, 649 F.2d 278 (4th Cir. 1981) *cert. denied* 454 U.S. 1090 (discharge).

Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978) *cert. denied* 440 U.S. 981 (1979) (hiring; promotion denial; recall; terms and conditions).

Reynolds v. Abbeville County School District No. 60, 554 F.2d 638 (4th Cir. 1977) (discharge).

Roman v. E.S.B., Inc., 550 F.2d 1343 (4th Cir. 1976) (discharge; hiring)

Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976) *cert. denied* 429 U.S. 920 (1976) (promotion denial; hiring).

Day v. Patapapsco & Back Railroad Co., 504 F. Supp. 1301 (D.Md. 1981) (terms and conditions; seniority system)

FIFTH CIRCUIT

Johnson v. Chapel Hill Independent School District, 853 F.2d 375 (5th Cir. 1988) (failure to rehire; retaliation).

Hernandez v. Hill County Telephone Corp., 849 F.2d 139 (5th Cir. 1988) (hiring; promotion denial; retaliation).

Comeaux v. Unirogal Chemical Corp., 849 F.2d 191 (5th Cir. 1988) (discharge).

Price v. Digital Equipment Corp., 846 F.2d 1026 (5th Cir. 1988).

Page v. US Industries, Inc., 726 F.2d 1038 (5th Cir. 1984) (hiring; promotion denial).

Freeman v. Motor Convoy, 700 F.2d 1339 (5th Cir., 1983) (hiring; seniority).

Adams v. McDougal, 695 F.2d 104 (5th Cir. 1983) (terms and conditions; failure to rehire).

Williams v. New Orleans Steamship Association, 688 F.2d 412 *cert. denied* 460 U.S. 1038 (1982) (5th Cir. 1982) (terms and conditions).

Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982) *cert. denied* 459 U.S. 1105 (1983) (discharge; retaliation).

Payne v. Travenol Lab, 673 F.2d 798 (5th Cir. 1982) (hiring; promotion denial).

Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982) (hiring; promotion denial).

Bobo v. ITT, Continental Baking Company, 662 F.2d 340 (5th Cir. 1982) *cert. denied* 456 U.S. 933 (1982) (discharge).

McWilliams v. Escambia County School Board, 658 F.2d. 326 (5th Cir. 1981) (transfer; demotion; promotion denial).

Jackson v. City of Kileen, 654 F.2d 1181 (5th Cir. 1981) (discharge).

Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980) (discharge).

Crawford v. Western Electric, 614 F.2d 1300 (5th Cir. 1980) (promotion denial).

Grigsby v. North Mississippi Medical Center, 586 F.2d 457 (5th Cir. 1978) (discharge; promotion denial; terms and conditions).

Claiborne v. Illinois Central Railroad, 583 F.2d 143 (5th Cir. 1978) *cert. denied* 442 U.S. 934 (1979) (promotion denial; discharge).

Barnes v. Jones County School District, 575 F.2d 490 (5th Cir. 1978) (discharge; demotion).

Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978) *cert. denied* 441 U.S. 968 (1979) (retaliation; promotion denial).

Prophet v. Armco Steel, Inc., 575 F.2d 579 (5th Cir. 1978) (discharge)

Garner v. Ciarrusso, 571 F.2d 1330 (5th Cir. 1978) (retaliation; discharge; terms and conditions).

Jenkins v. Caddo-Bossier Association for Retarded Citizens, 570 F.2d 1227 (5th Cir. 1978) (discharge; promotion denial; harassment; hiring)

Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977) (discharge).

Harkless v. Sweeny, Ind., 554 F.2d 1353 (5th Cir. 1977) *cert. denied* 434 U.S. 966 (1977) (failure to rehire).

Smith v Olin, 535 F.2d 862 (5th Cir. 1976) (discharge).

Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975) *cert. denied* 422 U.S. 1006 (1975) (failure to rehire).

Cooper v. Allen, 493 F.2d 765 (5th Cir. 1975) (hiring).

Belt v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972) (promotion denial; terms and conditions).

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970) *cert. denied* 401 U.S. 948 (1971) (discharge).

Quarles v. Northern Miss. Retardation Center, 455 F. Supp. 52 (N.D. Miss. 1978) *aff'd*, 580 F.2d 1051 (5th Cir. 1978) (discharge).

SIXTH CIRCUIT

Erebia v. Chrysler Plastic Products Corp., 863 F.2d 47 (6th Cir. 1988) (harassment).

Singala v. Electrolux Corp., 862 F.2d 316 (6th Cir. 1988) (discharge).

Simmonds v. Superior Pontiac Cadillac, Inc., 861 F.2d 721 (6th Cir. 1988) (discharge).

Horton v. Edgcomb Metals Company, 860 F.2d 1079 (6th Cir. 1988).

Waller v. Thames, 852 F.2d 569 (6th Cir. 1988) (harassment; constructive discharge).

Hill v. Duriron Company, Inc., 656 F.2d 1208 (6th Cir. 1981) (discharge)

Grano v. Department of Development, 637 F.2d 1073 (6th Cir. 1980) (terms and conditions)

Everson v. McLouth Steel Corp., 586 F.2d 6 (6th Cir. 1978) (discharge)

Winston v. Lear-Siegler, 558 F.2d 1266 (6th Cir. 1977) (discharge; retaliation)

Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974) (discharge; terms and conditions; promotion)

Rodgers v. Peninsular Steel Co., 542 F. Supp. 1215 (N.D. Oh. 1982) (hiring; promotion; harassment)

Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981) (discharge)

McGee v. Grand Rapids, 486 F. Supp. 584 (W.D. Mich. 1980), *aff'd*, 663 F.2d 1072 (6th Cir. 1981) (discharge)

SEVENTH CIRCUIT

Yarborough v. Tower Oldsmobile, Inc., 789 F.2d 508 (7th Cir. 1986) (discharge).

Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985) (terms and conditions; harassment; layoff; discharge).

Christensen v. Equitable Life Assurance Society, 767 F.2d 340 (7th Cir. 1985) *cert. denied* 474 U.S. 1102 (1985) (constructive discharge).

Mason v. Continental Ill. National Bank, 704 F.2d 361 (7th Cir. 1983) (promotion denial).

Ekamen v. Health and Hospitals Corporation of Marion County, 589 F.2d 316 (7th Cir. 1978) *cert. denied* 469 U.S. 821 (1984) (hiring; promotion; terms and conditions; retaliation)

Flowers v. Cronch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) (discharge).

Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976) *cert. denied* 433 U.S. 919 (1977) (discharge)

Gunn v. Dow Chemical Co., 522 F.Supp. 1172 (S.D. Ind. 1981) (terms and conditions; constructive discharge)

Dawson v. Pastrich, 441 F.Supp. 133 (N.D. Ind. 1977) (hiring)

EIGHTH CIRCUIT

Tart v. Levi Strauss & Co., 864 F.2d 615 (8th Cir. 1988) (discharge).

Lassiter v. Covington, 861 F.2d 680 (8th Cir. 1988) (discharge).

Estes v. Dick Smith Ford, 856 F.2d 1097 (8th Cir. 1988) (discharge)

Edwards v. Jewish Hospital of St. Louis, 855 F.2d 1345 (8th Cir. 1988) (discharge).

Scoggins v. Bd. of Education of the Nashville, Arkansas Public Schools, 853 F.2d 1472 (8th Cir. 1988) (discharge).

Monroe v. Guardsmark, Inc., 851 F.2d 1065 (8th Cir. 1988). (discharge)

Pacheco v. Advertisers Lithographing, 657 F.2d 191 (8th Cir. 1981) (promotion denial; suspension).

Owens v. Ramsey Corp., 656 F.2d 340 (8th Cir. 1981) (discharge)

Taylor v. Jones, 653 F.2d 193 (8th Cir. 1981) (discharge).

Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) (discharge; constructive discharge).

Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981) (retaliation).

Martin v. Arkansas Arts Center, 627 F.2d 876 (8th Cir. 1980) (discharge)

Middleton v. Remington Arms Co., Inc., 594 F.2d 1210 (8th Cir. 1979) (discharge)

Hudak v. Curators of the University of Missouri, 586 F.2d 105 (8th Cir., 1978) *cert. denied* 440 U.S. 985 (1979) (discharge; harassment; terms and conditions)

DeGraffenreid v. General Motors Assembly Division, 558 F.2d 480 (8th Cir. 1977) (discharge)

Donaldson v. Pillsbury Co., 554 F.2d 825 *cert. denied*, 434 U.S. 856 (1977)(8th Cir. 1977) (discharge)

Thompson v. McDonnell Douglas Corp., 552 F.2d 220 (8th Cir. 1977) (constructive discharge).

Stevens v. Junior College of St. Louis, 548 F.2d 779 (8th Cir. 1977) (discharge; retaliation)

Jimerson v. Kisco, 542 F.2d 1008 (8th Cir. 1976) (discharge).

King v. Yellow Freight Systems, Inc., 523 F.2d 879 (8th Cir. 1975) (discharge)

Payne v. Ford Motor Co., 461 F.2d 1107 (8th Cir. 1972) (terms and conditions)

Brady v. Bristol Meyers, Inc., 459 F.2d 621 (8th Cir. 1976) (terms and conditions)

Poindexter v. Kansas City, Mo. Water Dept., 573 F. Supp. 647 (W.D. Mo. 1983) *aff'd* 754 F.2d 377 (8th Cir. 1984) (discharge)

Robertson v. Doctor's Hospital, 570 F.Supp. 663 (E.D. Ark., 1983) (discharge)

Farrakhan v. Sears, Roebuck & Co., 511 F. Supp. 893 (D. Neb. 1980) (discharge)

Rose v. Eastern Neb. Human Services Agency, 510 F. Supp. 1343 (D. Neb. 1981) (discharge)

Lindsey v. Angelica Corp., 508 F. Supp. 363 (E.D. Mo. 1981) (hiring)

Madrigal v. Certaineed, 508 F. Supp. 310 (W.D. Mo. 1981) (discharge)

Metcalf v. Omaha Steel Castings Co., 507 F. Supp. 679 (D. Neb. 1981) (discharge)

Williams v. Trans World Air Lines, Inc., 507 F. Supp. 293 (W.D. Mo. 1980), *aff'd* , 660 F.2d 1267 (8th Cir. 1981) (discharge)

Spearman v. Southwestern Bell, 505 F. Supp. 761 (E.D. Mo. 1980), *aff'd* 662 F.2d 509 (8th Cir. 1981)

Coleman v. General Motors, 504 F. Supp. 900 (E.D. Mo. 1980), (8th Cir. 1981) (discharge; retaliation)

Taylor v. Jones, 495 F.Supp. 1285 (E.D. Ark., 1980) (non-renewal; discharge)

Setser v. Novack Investment Co., 483 F. Supp. 1147 (E.D. Mo. 1980), *rev'd on other grounds*, 638 F.2d 1137, (8th Cir. 1980), *vac'd and amended*, 657 F.2d 962 (8th Cir. 1981) (retaliation; hiring)

Sutton v. Addressograph-Multigraph Corp., 481 F. Supp. 1148 (E.D. Mo. 1979) (discharge)

Buckley v. City of Omaha, 477 F. Supp. 754 (D. Neb. 1978) *aff'd*, 605 F.2d 1078 (8th Cir. 1979)(discharge)

Slotkin v. Human Development Corp., 454 F. Supp. 250 (E.D. Mo. 1978) (retaliation; constructive discharge)

Mixon v. Hanley Ind., 454 F. Supp. 386 (E.D. Mo. 1978), *aff'd*, 594 F.2d 869 (8th Cir. 1978) (failure to rehire; discharge)

Oliver v. Moberly Missouri School District, 427 F. Supp. 82 (E.D. Mo. 1977) (hiring)

Mopkins v. St. Louis Die Casting Corp., 423 F. Supp. 132 (E.D. Mo. 1976), *aff'd*, 569 F.2d 454 (8th Cir. 1978) (discharge)

Jimerson v. Kisco Co., 404 F. Supp. 338 (E.D. Mo. 1976), *aff'd*, 542 F.2d 1008 (8th Cir. 1978) (discharge)

NINTH CIRCUIT

Brown v. Boeing Company, 843 F.2d 501 (9th Cir. 1988) *cert. denied*, 488 U.S. 865 (1988)(discharge).

Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985) *cert. denied*, 472 U.S. 1028 (1985)(discharge; retaliation)

Wiltshire v. Standard Oil Co., 652 F.2d 837 (9th Cir. 1981) (discharge)

London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir., 1981) (retaliation; discharge)

St. John v. Employment Development Corp., 642 F.2d 273 (9th Cir. 1981) (retaliation; discharge).

Shah v. Mt. Zion Hospital and Medical Center, 642 F.2d 268 (9th Cir. 1981) (discharge; retaliation)

Fong v. American Airlines, Inc., 626 F.2d 759 (9th Cir. 1980) (discharge)

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (discharge).

Smallwood v. National Can Co., 583 F.2d 419 (9th Cir. 1978) (retaliation; terms and conditions)

Cooper v. Dept. of Administration, State of Nevada, 558 F. Supp. 244 (D. Nev. 1982) (hiring)

Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) (discharge; harassment)

Chatman v. U.S. Steel, 425 F. Supp. 753 (N.D. Ca., 1977) (terms and conditions)

TENTH CIRCUIT

Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988) (retaliatory discharge; discriminatory discharge).

McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988) (discharge).

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (harassment).

Meade v. Merchants Fast Motorline, Inc., 820 F.2d 1124 (10th Cir. 1987) (discharge).

Whatley v. Scaggo Companies, Inc., 707 F.2d 1129 (10th Cir. 1983) *cert. denied*, 464 U.S. 938 (1983) discharge).

Trujillo v. State of Colorado, 649 F.2d 823 (10th Cir. 1981) (retaliation; terms and conditions; hiring)

Shah v. Halliburton Co., 627 F.2d 1055 (10th Cir. 1980) (discharge)

Manzanares v. Safeway Stores, 593 F.2d 968 (10th Cir. 1978) (terms and conditions)

Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1977) (discharge)

Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) (discharge)

Foster v. M.C.I., 555 F. Supp. 330 (D.Colo. 1983) *aff'd*, 773 F.2d 1116 (10th Cir. 1985) (discharge)

Whatley v. Skaggs, 502 F.Supp. 370 (D.Colo. 1980), *aff'd*, 707 F.2d 1129 (10th Cir. 1983) (discharge; demotion)

LaFore v. Emblem Tape & Label, 448 F.Supp. 824 (D.Colo. 1978) (discharge)

Apodaca v. General Electric Corp., 445 F. Supp. 821 (D.N.M. 1978) (discharge)

Enriquez v. Honeywell, Inc., 431 F. Supp. 901 (W.D. Ok. 1977) (terms and conditions)

ELEVENTH CIRCUIT

Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988) (retaliation).

Swint v. Pullman Standard, 854 F.2d 1549 (11th Cir. 1988) (promotion denial; terms and conditions).

Zaklama v. Mt. Sinai Medical Center of Greater Miami, 842 F.2d 291 (11th Cir. 1988) (discharge).

Graham v. Jacksonville, 568 F. Supp. 1575 (M.D.Fla. 1983) (discharge)

Nation v. Winn-Dixie Stores, Inc., 567 F. Supp. 997 (N.D.Ga. 1983) (promotion; demotion)

Schwartz v. State of Florida, 494 F. Supp. 574 (N.D.Fla. 1980) (hiring)

Johnson v. City of Albany, Georgia, 413 F. Supp. 782 (N.D.Ga. 1983) (hiring; promotion)

D.C. CIRCUIT

Frazier v. Consolidated Edison Corp., 851 F.2d 1447 (D.C. Cir. 1988) (discharge).

Barber v. American Security Bank, 841 F.2d 1159 (D.C. Cir. 1988) (discharge).

Underwood v. District of Columbia Armory Bd., 816 F.2d 769 (D.C. Cir. 1987) (promotion denial).

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) (terms and conditions).

Metrocare v. Washington Area Metro Area Transit Authority, 679 F.2d 922 (D.C. Cir. 1982) (discharge; failure to promote).

Harris v. Group Health Association, Inc., 662 F.2d 869 (D.C.Cir. 1981) (discharge)

Weahkee v. Perry, 587 F.2d 1256, (D.C.Cir. 1978) (discharge; promotion)

Payne v. Blue Bell, 550 F. Supp. 1324 (M.D.N.C. 1982) (discharge).

Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C.Cir. 1981) (terms and conditions; hiring)

Pope v. City of Hickory, North Carolina, 541 F. Supp. 872 (W.D.N.C. 1981), *aff'd* 679 F.2d 20 (4th Cir. 1982) (discharge; terms and conditions).

Cormier v. P.P.G. Industries, 519 F. Supp. 211 (W.D. La. 1981) *aff'd*, 702 F.2d 567 (5th Cir. 1982) (hiring; promotion denial).

Adams v. Gaudet, 515 F. Supp. 1086 (W.D.La. 1981) (hiring; promotion denial).

Fisher v. Dillard Univ., 499 F. Supp. 525 (E.D. La. 1980) (discharge; terms and conditions).

Reynolds v. Sheet Metal Workers Local 102, 498 F.Supp. 952 (D.D.C. 1980), *aff'd*, 702 F2d. 221 (D.C.Cir. 1981) (hiring; training)

Crawford v. Railway Express, Inc., 485 F. Supp. 914 (W.D. La. 1980) (retaliation).

Johnson v. Olin Corp., 484 F. Supp. 577 (S.D. Tex. 1980) (discharge)

Robertson v. Maryland State Department, 481 F. Supp. 108 (D.Md. 1978) (termination; failure to rehire)

Liotta v. National Forge Co., 473 F. Supp. 1139 (W.D. Pa. 1979), *aff'd in part, rev'd in part*, 629 F.2d 903 (3rd Cir. 1980) (discharge; retaliation).

Walker v. Robbins Hose Co., 465 F. Supp. 1023 (D.Del., 1979) (hiring).

Queen v. Dresser Industries, Inc., 456 F. Supp. 257 (D.Md. 1978) *aff'd* 609 F.2d 509 (4th Cir. 1979) (terms and conditions).

Neely v. City of Grenada, 438 F. Supp. 390 (N.D. Miss. 1977) (hiring; promotion denial).

Crocker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3rd Cir. 1981) (hiring; lay-offs; promotion denial; terms and conditions; harassment)

Winston v. Smithsonian Science Information Exchange, Inc., 437 F.Supp. 456 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C.Cir. 1979) (discharge; terms and conditions)

Jawa v. Fayettevill State Univ., 426 F. Supp. 218 (E.D.N.C. 1976) (discharge; terms and conditions; promotion denial; retaliation).

Johnson v. Shreveport Garment Co., 422 F. Supp. 526 (W.D.La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978) (terms and conditions; promotion denial).

Morris v. Board of Education, 401 F. Supp. 188 (D.Del., 1975) (discharge; failure to rehire).

APPENDIX F

Legislative History References to
§ 101 as Restoring Pre-Patterson
Interpretation of § 1981

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
SENATE--FEBRUARY 7, 1990	
Kennedy (S1018)	"The Civil Rights Act of 1990 is intended to overturn these Supreme Court decisions and restore and strengthen these basic laws. The Patterson decision, interpreting the 1866 civil rights law . . . nullified the only Federal antidiscrimination law applicable to the 11 million workers in . . . firms with fewer than 15 employees. Already the damage is unmistakable . . . and [the decision] should be overruled by Congress."
Jeffords (S1021)	"The Civil Rights Act of 1990 was drafted with the specific intention of overruling dome of these decisions, as well as to restore and strengthen our civil rights laws. . . First. In Patterson versus McLean Credit Union, the Court reached the astounding conclusion that [§ 1981] pertained only to the formation of

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	the contracts and not to any conduct occurring thereafter. . . The Civil Rights Act of 1990 amends section 1981 to reaffirm that the right to make and enforce contracts includes the enjoyment of all the benefits, privileges, terms and conditions of the contractual relationship."
Hatfield (S1023)	"The Civil Rights Act of 1990 would essentially overturn those Supreme Court decisions. . . First, it would restore the prohibition against racial discrimination in the making and enforcement of contracts. . . [to include] the enjoyment of all benefits, terms and conditions of the contractual relationship."
Simon (S1024)	"The Civil Rights Act of 1990 would reverse five Supreme Court decisions that do particular harm to the notion of equal employment rights for all. The bill would reverse Patterson. . ." "Fortunately, Congress can, and should, step in to restore the civil rights safety net ripped open by the Supreme Court."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Packwood (S1024)	"During 1989, however, the U.S. Supreme Court issued a series of decisions in employment discrimination cases that threaten to set back our progress in the area of job opportunity by decades. As a result of the decision in Patterson . . . victims of even the most egregious racial harassment in the workplace can obtain no meaningful remedy."
Cranston (S1025)	"The bipartisan legislation being introduced today is designed to reverse the adverse impact of these decisions and to restore our Nation's strong and effective weapons against employment discrimination."
	SENATE--JUNE 8, 1990
Labor and Human Resources Committee Report (Page 12)	"Many Supreme Court decisions have held that section 1981 prohibits intentional race discrimination in the making and enforcement of private contracts, as well as in state action affecting individuals' ability to make and enforce contracts. . . The Patterson decision sharply cut back on the scope and effectiveness of section 1981."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
(Page 58)	Section 12 of the 1990 CRA "is intended to overrule the Supreme Court's decision in Patterson, which adopted an incorrect, crabbed interpretation of the law known as section 1981. . . . The Act would overrule Patterson."
	SENATE--JULY 10, 1990
Hatch (S9331)	"I have to say that with respect to the Patterson versus McLean case, which the distinguished Senator from Massachusetts said has to be overruled, there is no disagreement. I agree with that. I have from the beginning. The White House, as far as I know, has from the beginning . . . We agree that section 1981 . . . should also cover the terms and conditions. . . We are going to overturn Patterson."
	SENATE--JULY 17, 1990
Mikulski (S9845)	"That section of the substitute seeks to overrule the Supreme Court's decision in Patterson . . . and to restore the prohibition against all racial discrimination in the making

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	and carrying out of contracts in 42 U.S.C. § 1981."
Kennedy (S9848)	"Now, we put the law back to what it was prior to Patterson in our substitute. The Bush administration has also adopted virtually similar language in their own proposal, to overturn Patterson."
	SENATE--JULY 18, 1990
Kennedy (S9906)	Objecting to a substitute which would not adequately restore section 1981, stating "it is quite clear that the substitute would offer no relief to Brenda Patterson or to the victims of intentional race discrimination in the more than 200 other cases dismissed because of the Supreme Court's clear misinterpretation of the law, because we are restoring the rights of these various defendants to what they were prior to the time of the Brenda Patterson [decision], and the substitute does not do so."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Kassebaum (S9906)	"We all wish to address the five Supreme Court decisions in a way that can correct those decisions so that we can address the question of discrimination that was weakened by those five Supreme Court decisions."
Dodd (S9914)	"Last year, however, the Supreme Court shocked the American public, the Congress, and even the administration when it blatantly reneged on its commitment to providing hard-working Americans equal protection under laws. . . To restore the heart and soul to our civil rights laws . . . the Congress, in my view must act to overturn the 1989 Supreme Court rulings."
Cranston (S9942)	"The Civil Rights Act of 1990 restores the proper balance between employee and employer rights by conforming the congressional intent regarding the broad scope of our civil rights laws."
Conrad (S9957)	"This is an incredibly important proposal. It reverses or modifies a series of Supreme Court decisions which have severely weakened our country's civil rights protections."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Kohl (S9957)	"I am proud to support efforts to restore remedies and protections to employees who are victims of discrimination."
Riegle (S9957)	"One of last year's most egregious Supreme Court decisions, [Patterson], seriously limited the scope of section 1981 by protecting only against discrimination in the making of an employment contract; that is, hiring. . . . This decision seriously undermines the equal opportunity laws which have been developed over the years."
Kerry (S9958)	"Tonight we attempt to reverse the recent actions of the Supreme Court and restore the full force of the antidiscrimination law."
Levin (S9961)	"The Civil Rights Act of 1990 will restore and strengthen our civil rights laws to the scope which Congress intended and which the courts had interpreted them to have until the 1988-89 Supreme Court term."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JULY 30, 1990
Committee on Education and Labor Report (Page 17)	The Patterson decision sharply cut back on the scope and effectiveness of section 1981, shattering the uniform concensus the federal courts had reached on the scope of the statute. . . . Prior to the Patterson ruling, every federal court of appeals had held that section 1981 prohibits not just discrimination at the formation of an employment contract, but discrimination during the performance of that contract as well. . . . The committee finds that The Supreme Court's ruling in Patterson v. McLean Credit Union conflicts federal appellate case law defining the scope of section 1981."
(Page 86)	"The purpose of enacting the Civil Rights Act of 1990 is to restore the rights, protections and remedies that were available under Title VII and Section 1981 prior to last year's Supreme Court's decisions. . . . [Section 1981] has provided important and in many instances exclusive federal relief against race discrimination in contractual relations, including employment relationships, for many years."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JULY 31, 1990
Judiciary Committee Report (Page 42)	"Many Supreme Court decisions have held that Section 1981 prohibits intentional racial discrimination in the making and enforcement of private contracts . . . In Patterson, the Supreme Court gave Section 1981 a narrow interpretation. . . . This subsection overrules Patterson."
	HOUSE--AUGUST 2, 1990
Hayes (H6324)	"It would certainly be a sad commentary if we were to fail today to restore and strengthen our laws that attempt to wipe out prejudice on the job."
Lloyd (H6332)	"What we want to accomplish today is to restore the degree of civil rights protection provided by the 1866 and 1964 acts."
LaFalce (H6774)	"Our discrimination laws, as interpreted by the Supreme Court, are now disgracefully weak. We must reverse those Supreme Court decisions, and we must strengthen the civil rights law that exist."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Panetta (H6779)	"The Supreme Court unfortunately has eroded those tools and undermined the ability to protect equal rights. This bill restores the vital tools that we need for enforcement."
Levine (H6733)	"[T]his legislation, unamended will reverse what the Supreme Court has done in the late 1980's, in order to restore what we thought we were doing as a nation in the 1960's."
Lowey (H6790)	"The Civil Rights Act of 1990-H.R. 4000-overturns these decisions. It will restore and strengthen our civil rights laws by making clear that employment decisions based on prejudice are illegal."
Oakar (H6791)	"[T]his legislation, in seeking to overturn six recent Supreme Court decisions, merely restores civil rights laws to the conditions prior to 1989."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Mineta (H6793)	"In recent years, a number of decisions by the U.S. Supreme Court have weakened U.S. civil rights laws-the very laws that make our nation great. Today, with the Civil Rights Act of 1990, the House has the opportunity to restore the health and integrity of our commitment to civil rights."
Stokes (H6794)	"In effect, the Supreme Court has taken us back to where we were before 1964. Now Congress is having to restore those rights."
Owens (H6795)	"We have the opportunity today to help stop the backward slide, to repudiate the Supreme Court's attack on equal employment opportunity and restore the vitality of our civil rights laws."
Espy (H6796)	"[T]his is not just a civil rights bill, this is a civil [rights] restoration act."
Vento (H6799)	"H.R. 4000 clarifies Congressional intent and reinstates prior Federal judicial interpretations to include all aspects of a private contract. . ."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--AUGUST 3, 1990
Kennelly (H6758)	"This legislation we have before us only attempts to restore those policies that we, in the Congress, thought were operative until the Supreme Court narrowed the application of the law. . . . I think it is critical that we restore the law."
Matsui (H6763)	"The Civil Rights Act of 1990 restores to women and minorities in the workforce the guarantee that their rights will not be abridged."
Serrano (H6764)	"The purpose of the [Act] is to restore and restrengthen civil rights laws that ban discrimination in employment."
	HOUSE--OCTOBER 17, 1990
Edwards (H9977)	"The Civil Rights Act of 1990 amends the Civil Rights Acts of 1866 and 1964 to restore and strengthen civil rights laws that ban discrimination in employment. The Supreme Court dramatically narrowed these laws in a series of decisions last year."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Hayes (H9989)	"This legislation . . . restores and strengthens the protections of every American and moreover, it sends a clear message that there will be not be any reversal on our national commitment to equal justice for all."
	SENATE--OCTOBER 16, 1990
Hatch (S15329)	"There is one aspect of this bill everyone agrees with, as I understand it, or at least overwhelmingly would agree with and that is the . . . overrule of the Patterson versus McLean case."
Metzenbaum (S15334)	"This conference report embodies the will of a strong majority of the Senate. More importantly, the conference report restores basic civil rights protections for millions of Americans. Women and minorities were victimized last year in a series of stunning Supreme Court decisions. Those decisions turned back the clock on our progress toward equal opportunity."
Mikulski (S15377)	"[A]ll this legislation does is restore certain civil rights that were overturned by certain other legal

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	cases."
Adams (S15379)	"These rulings marked an erosion of the more than 25 years of progress made in eliminating discrimination in the workplace. I am proud that today we will reverse this trend and again send a message to employers throughout this country that the American people will not tolerate discrimination."
Levin (S15381)	"The Civil Rights Act of 1990 would restore and strengthen our civil rights laws in a balanced way."
Mitchell (S15400)	"[The bill] seeks to restore to the law the interpretation of job-place discrimination which was the law of the land from 1971 to 1989. It would restore explicitly to the law the understanding that a contract cannot be honored in the making and broken in the performance without contravening the law."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--OCTOBER 24, 1990
Hatch (S16565)	Expressing opposition to one version of the bill, "except for the overrule of the Patterson versus McLean case which would take care of Brenda Patterson. We are prepared to do that right now. We are for overruling the Patterson versus McLean case."
Kassebaum (S16575)	"It is the President's view, a view I strongly share, that legislation is needed to address the Supreme Court decisions handed down last year that have weakened civil rights protections. These rulings have swung the pendulum in favor of employers and against the real and potential victims of discrimination and harassment."
Kerry (S16577)	"This bill is designed to correct those decisions, to restore the full force of the antidiscrimination laws which have guided us for more than two decades."
Hollings (S16580)	"[I]t is clear to any citizen that [Patterson] twisted the spirit of the law, and the current legislation is needed to restore its intent."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Akaka (S16585)	"Those of us who support civil rights sought this bill to overturn six recent Supreme Court decisions that have greatly diminished the ability of women and minorities to win job discrimination suits. We saw our vote as restoring prohibitions against employment discrimination that have been in force for nearly 20 years."
Levin (S16586)	"This bill would restore some of the rights we fought so hard for in the 1960's and 1970's that were lost in a few Supreme Court decisions in the 1980's. Those decisions last year took us backward. This bill would overturn those decisions and take us forward."
	SENATE--FEBRUARY 22, 1991
Simpson (S2261)	"In agreement with the administration, Senator Kennedy, and the civil rights groups, my bill would also overturn . . . Patterson."
	SENATE--MARCH 12, 1991
Hatch (S3026)	"I am pleased that that bill overturns . . . Patterson."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--JUNE 4, 1991
Durenberger (S7026)	The Civil Rights Act overturns Patterson and "[a]ll interested parties, including the administration, civil rights groups and business groups, agree that these two cases incorrectly narrowed the protections available to minorities."
Chafee (S7027)	Patterson and the other 1989 Supreme Court decisions "established far more stringent requirements than had previously existed in discrimination suits. . . . At worst, the Court took a 180-degree turn from what we in Congress over the years have tried to do. At best they took an unnecessarily severe interpretation of our intent. . . We wrote the statutes that the Court interpreted. We must be sure the rights guaranteed by those statutes remain intact."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JUNE 4, 1991
Brooks (H3834)	Patterson and other 1989 decisions "narrowed the interpretation of these laws and threaten to erode the progress we have made. Passage of H.R. 1 is, therefore, essential to assure fair treatment in the work place for all Americans."
Gephardt (H3837)	The CRA of 1991 "restores the law as it existed before the 1989 Supreme Court decisions that weakened an individual's recourse against discrimination and all but denied victims of discrimination protection under the law."
Gunderson (H3841)	"The President overturns the Supreme Court on Patterson. Yes, the Democratic bill does, too."
Moorhead (H3843)	"[T]he much criticized Patterson case is overruled."
Clay (H3844)	The 1991 Act "simply seeks to restore the fair balance between employers and employees that existed for 25 years prior to the Supreme Court's notorious 1989 term. . . Those 1989 decisions gutted title VII's effectiveness."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Wolpe (H3845)	Central purpose of the 1991 Act "is simply to restore equal employment opportunity to where it was before a series of recent Supreme Court decisions made it much more difficult for victims of discrimination."
Collins (H3859)	In Patterson "the Court turned the clock back" and the bills she supported "would reinstate these modern-day protections."
Hughes (H3859)	The Patterson provision and certain other provisions "will restore civil rights standards that served us well for many years. . . This legislation will correct the aggressive tilt in the civil rights law created by five 1989 U.S. Supreme Court decisions."
Espy (H3862)	The CRA of 1991 "does not make any radical changes in civil rights law. . . It will restore laws which have served our Nation well."
Mineta (H3862)	"Before the Supreme Court decisions, we had a system that worked for 18 years and could have worked for years to come. We need to put that system back in place."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Stokes (H3863)	The Supreme Court wrote "in the law a series of loopholes that permit many employers to discriminate with virtual impunity. . . H.R. 1 would close the court-created loopholes."
Lewis (H3865)	The CRA of 1991 "only attempts to take us back to where we were before the recent Supreme Court decisions."
Kennedy (H3866)	"For decades, the Court said that an 1866—yes, 1866—law prevented discrimination on the job. Now the Court says that the law only prevents prejudice at the door—at the time of hiring. . . Now we are going to do something about these latest backward decisions. Because America will not tolerate racial bias on the job any more than at the time of hiring."
Romer (H3866)	The CRA of 1991 "will restore and strengthen the equal employment opportunities that were severely weakened by Supreme Court decisions in 1989."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Edwards (H3869)	The 1991 Act "amends the Civil Rights Acts of 1866 and 1964 to restore and strengthen their prohibition against employment discrimination. The Supreme Court dramatically narrowed these laws in a series of decisions in 1989. . . The Michel Republican substitute reverses only one of the devastating 1989 Supreme Court decisions, the Patterson case."
Levine (H3875)	The CRA Act of 1991 "would restore to the disenfranchised American workers equal opportunity rights lost in Supreme Court decisions in 1989."
Gunderson (H3885)	"Both [H.R. 1 and the Administration's bill] overturn the Supreme Court in Patterson, restoring the expansive reading of protections against discrimination in all aspects of contracts."
Owens (H3888)	"We have the opportunity today to help stop the backward slide, to repudiate the Supreme Court's attack on equal employment opportunity and restore the vitality of our civil rights laws."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Waters (H3890)	The Supreme Court decisions "effectively eroded rights that we thought we already had."
Towns (H3895)	In Patterson, the Supreme Court "has stripped workers of any protection against racial or sexual harassment at work. . . . Only Congress can fully restore the protections and remedies stripped from American workers by the 1989 Supreme Court decisions."
Goodling (H3900)	"Probably the most important of all is the Patterson case, which is totally reversed by the President's" bill. The Michel substitute "restores the expansive reading of section 1981 that racial discrimination is prohibited in all aspects of the making and enforcement of contracts. . . . As did my colleagues on the other side of the aisle, we recognize that. . . . the Supreme Court restricted Federal civil rights protections in a manner that was not consistent with the intent of Congress."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JUNE 5, 1991
Brooks (H3928)	"[D]espite the complexity of the subject matter, the simplicity of the legislative goal remains clear--that of restoring what had been the law and what had been the operating procedures for the past 25 years before the Supreme Court decided to change the rules in midcourse."
Morella (H3938)	The 1989 decisions "have narrowed the application of important civil rights laws" and the substitute "restores and strengthens our civil rights laws."
Shays (H3946)	The recent Supreme Court decisions in 1989 "seriously weakened the employment protection provisions of the landmark 1964 act. The reality is we need the Brooks-Fish civil rights bill to undo the damage done by the Supreme Court."
Zimmer (H3947)	"[T]here is nearly universal agreement that legislation is needed to reverse several restrictive Supreme Court decisions."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
McMillen (H3954)	"We are in a position today to reaffirm our commitment to equal opportunity and restore the status quo that existed before the six recent Supreme Court decisions."
Skaggs (H3956)	"America needs to regain the ground lost in civil rights as a result of recent Supreme Court decisions. . . [W]e need to put the country back on the track of progress from which the High Court derailed us in 1989."
Bustamante (H3957)	Recent Supreme Court rulings have narrowed "the scope of legislation designed to prevent work place discrimination."
Delugo (H3957)	The House has worked diligently "to frame legislation to overturn 1989 Supreme Court decisions that severely reduce remedies for civil rights violations."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--OCTOBER 25, 1991
Kennedy (S15233)	"Members of this body have joined with administration representatives to craft a civil rights bill that will restore to all Americans the ability to enforce their rights to equal opportunity."
	SENATE--OCTOBER 28, 1991
Seymour (S15285)	"[T]he bill restores section 1981--one of the Nation's oldest civil rights laws--to its original intent by allowing victims of race discrimination in all facets of the work environment to seek legal remedies."
Metzenbaum (S15287)	In its 1989 decisions, "the Court retreated from long-standing rules and principles, making it harder for victims of discrimination to get into court, harder for them to prove their cases, and harder for them to obtain meaningful relief if they won their cases. . . [W]e are finally returning this Nation to the pursuit of fairness and equality of opportunity in the workplace."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--OCTOBER 29, 1991
Jeffords (S15383)	"Every civil rights proposal made over the past year and a half has included a Patterson reversal as one of its terms. . . [W]e will restore the rights taken away in Patterson."
Breaux (S15391)	The 1989 Supreme Court decisions brought "the reversal of long-standing gains in civil rights."
	SENATE--OCTOBER 30, 1991
Robb (S15445)	"This act restores the civil rights remedies which were taken away in the late 1980's by the new majority on the Supreme Court."
Dodd (S15465)	"I strongly believe that it is imperative that we restore the full force and effectiveness of our Nation's civil rights laws to millions of minorities and women."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Gore (S15482)	"During the 1988-89 term, the U.S. Supreme Court handed down decisions in a series of cases which severely curtailed the rights of minorities and women in the workplace and made it harder for them to fight discrimination. This bill recognizes that those decisions were flawed . . . and restores protections against racial and ethnic discrimination which were struck down by these rulings."
Danforth (S15483)	The Patterson section of the bill "reinstates the prohibition of discrimination during the performance of the contract and restores protection from racial and ethnic discrimination to the millions of individuals employed by firms with fewer than 15 employees."
Danforth (S15500)	"What was wrong was that in the year 1989 the Supreme Court chose to turn the clock back, and that can never happen in civil rights; it can never be allowed to happen."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
HOUSE--NOVEMBER 7, 1991	
Edwards (H9526)	The Patterson provision "reinstates the prohibition of discrimination during the performance of the contract and restores protection for racial and ethnic discrimination to millions of individuals."

APPENDIX G

Court of Appeals Decisions Since *Bradley v. Richmond Sch. Bd.* Applying Statutes Affecting Remedies and Procedures To Pending Cases

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1. *United States v. Peppertree Apartments*, 942 F.2d 1555, 1560-61 (11th Cir. 1991) (explaining that "[s]tatutory changes that are remedial in nature apply retroactively.... The change in the statute ... does not impose a new obligation upon [the defendant]. Instead, it imposes an additional remedy on already proscribed conduct."), *petition for cert. filed* (Dec. 26, 1991).

2. *In re Resolution Trust Corp.*, 888 F.2d 57, 58 (8th Cir. 1989) (endorsing presumption favoring application to pending cases for "new enactments changing procedural or jurisdictional rules").

3. *Delta Computer Corp. v. Samsung Semiconductor*, 879 F.2d 662, 663 (9th Cir. 1989) (applying statute to pending cases when it is "addressed to remedies or procedures and does not otherwise alter substantive rights") (quoting *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985).

4. *Nichols v. Stapleton*, 877 F.2d 1401, 1403 (9th Cir. 1989) (applying to pending cases new statutes that change remedies and procedures, not substantive rights)

5. *Kruso v. International Telephone and Telegraph Corp.*, 872 F.2d 1416, 1425 (9th Cir. 1989) (endorsing presumption in favor of applying to pending claims "a statute ... addressed to remedies or procedure").

6. *DeGurules v. I.N.S.*, 833 F.2d 861, 863 (9th Cir. 1987) (finding no manifest injustice under *Bradley* when new law provides "a grant or expansion of an access to a remedy").

7. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 748 (D.C. Cir. 1986) (explaining that "this circuit views statutes that change substantive *rights* as differing from those -- as in *Bradley* -- that merely change substantive *remedies*") (emphasis in original).

8. *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985) (endorsing presumption in favor of applying law "addressed to remedies or procedures").

9. *United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985) (endorsing presumption in favor of applying laws "that affect only procedure or remedy").

10. *United States v. Kairys*, 782 F.2d 1374, 1381 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1984) (finding a statute remedial when it "relates to the means and procedures for enforcement of [existing] rights")

11. *Shirey v. Devine*, 670 F.2d 1188, 1197 (D.C. Cir. 1982) (applying new statute to pre-

existing claims where it "refined and strengthened the remedies available to enforce pre-existing rights.")

12. *Eikenberry v. Callahan*, 653 F.2d 632, 635-36 n.14 (D.C. Cir. 1981) (recognizing remedy-right distinction in determining new law's applicability to pending cases).

13. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir. 1980) (explaining that application to pending claims of new enforcement mechanisms rarely involves any risk of serious unfairness because it "harbors much less potential for mischief than retroactive changes in the principles of liability.... Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known")

14. *Reeves v. International Tel. and Tel. Corp.*, 616 F.2d 1342, 1350 (5th Cir. 1980) (endorsing presumption in favor of applying to pre-existing claims new laws which "are procedural and affect only remedies"), *cert. denied*, 449 U.S. 1077 (1981).

15. *Samuelson v. Susen*, 576 F.2d 546., 551 (3rd Cir. 1978) (endorsing presumption in favor of applying "laws of a remedial or procedural nature").

16. *Cooper Stevedoring of Louisiana, Inc. v. Washington*, 556 F.2d 268, 272 (5th Cir.), *reh'g denied*, 560 F.2d 1023 (1977) (finding new statute applicable that affected

procedural, not substantive rights).

17. *United states v. Blue Sea Line*, 553 F.2d 445, 448 (5th Cir. 1977) (concluding that a statutory change that is "primarily procedural" takes precedence over prior law)

APPENDIX H

Court of Appeals Decisions Prior to *Bradley v. Richmond Sch. Bd.* Recognizing a Distinction Between New Laws Affecting Standards of Conduct or Vested Rights, Which Were Presumed Inapplicable to Pending Cases, and Methods for Enforcing Existing Rights, Which Were Presumed Applicable

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1. *Koger v. Ball*, 497 F.2d 702, 705 (4th Cir. 1974) (applying new remedial procedures to federal employees' race discrimination claims because "[p]rocedural statutes that affect remedies" are generally applicable to pending cases)

2. *Federal Shopping Way, Inc. v. McQuaid*, 457 F.2d 176, 180 (9th Cir. 1972) (concluding that "where the statute relates to remedies only and does not effect substantive rights, we recognize an exception to the general rule that amendments are prospective only.")

3. *United States v. Haughton*, 413 F.2d 736, 738 (9th Cir. 1969) (concluding that change in administrative procedure for conscientious objector requests applied because "[s]tatutes effecting procedural changes, which do not otherwise alter substantive rights, generally are considered immediately applicable to pending cases.")

4. *Turner v. United States* 410 F.2d 837, 842 (5th Cir. 1969) (concluding that change in administrative procedure for conscientious objector request applied because "changes

in statute law relating only to procedure or remedy are usually held immediately applicable to pending cases, including those on appeal from a lower court.")

5. *Grummit v. Sturgeon Bay Winter Sports Club*, 354 F.2d 564, 568 (7th Cir. 1966) (applying a change in the notice of injury requirement that allowed increased compensation for a negligence claim because "its retroactive effect violated no right of the defendant.")

6. *United States v. Village Corp.*, 298 F.2d 816, 820 (4th Cir. 1962) (allowing government to pursue claims against dissolved corporations under a new statute because the statute "altered no substantive right. It only altered the procedure by which substantive rights may be judicially enforced.").

7. *Dargel v. Henderson*, 200 F.2d 564, 566 n. 5 (Em. Ct.App. 1952) (applying new law conferring jurisdiction for enforcing rent regulations because "changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future unless a contrary intent is expressed in the statute.")

8. *Beatty v. United States*, 191 F.2d 317, 320 (8th Cir. 1951) (applying new law that allowed government to recover for overcharges to a tenant because presumption of prospective effect "does not apply to statutes which effect merely changes in remedies or modes of procedure

for enforcing existing liabilities.")

9. *Orr v. United States*, 174 F.2d 577, 580 (2d Cir. 1949) (removing bar to a libel claim by applying new law to a pending case because statute of limitations is only a procedural change)

10. *Bowles v. Strickland*, 151 F.2d 419 (5th Cir. 1945) (applying in a pending case a change in the statute of limitations that allowed the government to recover for three times the amount of a seller's overcharge because it "did not affect substantive rights, but related only to the procedural machinery provided to enforce such rights.")

11. *Luckenbach S.S. Co. v. Norton*, 106 F.2d 137, 138 (3d Cir. 1939) (finding that application to a pending case of new law that allowed for increased compensation for injury was "remedial, affecting matters of procedure")

12. *New Amsterdam Casualty Co. v. Cardillo*, 108 F.2d 492, 493 (D.C. Cir. 1939) (applying to a pending case a new law that allowed for increased compensation for injury because it "neither creates new, nor destroys old rights. It applies only to the remedy")

13. *Federal Reserve Bank of Richmond v. Kalin*, 77 F.2d 50 (4th Cir. 1935) (finding that new law conferring jurisdiction applied in a pending case because "'[s]tatutes relating to practices and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may

have arisen before.'" (quoting *Link v. Receivers of Seabord Air Line Ry Co.*, 73 F.2d 149, 151 (4th Cir. 1934)).

14. *Downs v. Blount*, 170 F. 15, 21 (5th Cir. 1909) (holding that new law changing rules of evidence applied to a pending case because "[t]he prohibition against the enactment of retroactive law in the Texas Constitution . . . does not cut off remedial laws nor curative statutes which do not deprive one of vested rights.")

15. *Larkin v. Saffarans*, 15 F. at 149, 150 (Explaining that "one can have no vested right to any particular remedy, or to sue or be sued in any particular court," and thus applying new law conferring jurisdiction because it "takes away from these defendants no right of action, or defense to this action on its merits.")

APPENDIX I

United States Supreme Court Orders
Applying New Rules to Pending Cases Absent Injustice

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1. Order Amending Federal Rules of Criminal Procedure, 109 L. Ed. 2d xxxv (May 1, 1990) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

2. Order Amending Federal Rules of Appellate Procedure, 104 L. Ed. 2d lii (April 25, 1989) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

3. Order Amending Federal Rules of Criminal Procedure, 104 L. Ed. 2d lvi (April 25, 1989) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

4. Order Changing Federal Rules of Criminal Procedure, 94 L. Ed. 2d lxxviii (March 9, 1987) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

5. Order Changing Rules of Appellate Procedure, 89 L. Ed. 2d xliii (March 10, 1986) (making changes applicable to pending cases "insofar as just and practicable").

6. Order Amending Bankruptcy Rules, 85 L. Ed. 2d xxxix (April 29, 1985) (making changes applicable to pending cases "insofar as just and practicable").

7. Order Amending Federal Rules of Criminal Procedure, 85 L. Ed. 2d xliv (April 29, 1985) (making changes applicable to pending cases "insofar as just and practicable").

8. Order Amending Bankruptcy Rules, 75 L. Ed. 2d xliii (April 25, 1983) (making changes applicable to pending cases unless doing so would "not be feasible or would work injustice").

9. Order Amending Rules Governing Proceedings Under 28 U.S.C.S. §§ 2254, 2255 in the United States District Court, 72 L. Ed. 2d xlv (April 28, 1982) (making changes applicable to pending cases "insofar as just and practicable").

10. Order Amending Federal Rules of Criminal Procedure, 72 L. Ed. 2d lix (April 28, 1982) (making changes applicable to pending cases "insofar as just and practicable").

11. Order Modifying Rules and Forms Governing Proceedings Under 28 U.S.C.S. §§ 2254, 2255, 47 L. Ed. 2d xliv (April 26, 1976) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

12. Order Modifying Bankruptcy Rules and Forms, 47 L. Ed. 2d lxv (April 26, 1976) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

13. Order Amending Bankruptcy Rules and Forms, 44 L. Ed. 2d xxxiii (April 28, 1975) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

14. Order Changing Rules of Bankruptcy Procedure, 44 L. Ed. 2d lxi (April 28, 1975) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

15. Order Changing Bankruptcy Rules and Forms, 39 L. Ed. 2d xxxvii (March 18, 1974) (making changes applicable to pending proceedings unless doing so "would not be feasible or would work injustice").

16. Order Changing Bankruptcy Rules and Official Bankruptcy Forms, 36 L. Ed. 2d xxxvii (April 24, 1973) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

17. Order Changing Bankruptcy Rules and Official Bankruptcy Forms, 37 L. Ed. 2d xxxi (April 24, 1973) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

18. Order Establishing the Federal Rules of Evidence, 34 L. Ed. 2d lxv (November 20, 1972) (making rules applicable to pending proceedings unless doing so "would not be feasible or would work injustice").

19. Order Amending Rules of Civil Procedure for the United States District Courts 15 L. Ed. 2d lxxv (February 28, 1966) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

20. Order Amending Federal Rules of Civil Procedure, 9 L. Ed. 2d liv, lxv, lxvii (March 18, 1963) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

21. Order Amending Federal Rules of Civil Procedure and Forms, 6 L. Ed. 2d xxxvii, xxxviii - ix (April 17, 1961) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

22. Order Amending Rules of Practice in Admiralty and Maritime Cases, 6 L. Ed. 2d xl, xlvii - viii (April 17, 1961) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

23. Order Amending Federal Rules of Civil Procedure, 91 L. Ed. 2113, 2124 (Dec. 27, 1946) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

24. Order Adopting Rules of Civil Procedure for the District Courts of the United States, 82 L. Ed. 1563, 1608 (Dec. 20, 1937) (making rules applicable to pending proceedings unless doing so "would not be feasible or would work injustice").

APPENDIX J

Old Treatises Recognizing The Rule in Favor of Application of New Remedial, Procedural, and Restorative Statutes to Pending Cases

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1. H.C. Black, Handbook on the Construction and Interpretation of the Laws (1911)

Defining "the General Rule" to incorporate certain established exceptions:

> Except in the case of *remedial* statutes and those which relate to procedure in the courts, it is a general rule that acts of the legislature will not be so construed to make them operate retrospectively....

Id. at 385 (emphasis added).

Defining "retrospective" as altering substantive or vested rights:

> A retrospective law is one which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them effects which are not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence.

Id. at 380.

> The statutes ... subjected to the strictness of judicial construction -- statutes which may be properly be denominated 'retrospective' -- are

> such as take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past.

Id. at 404.

Explaining that remedial statutes may be applied retrospectively:

> Remedial statutes are to be liberally construed; and if a retrospective interpretation will promote the ends of justice and further the design of the legislature in enacting them, or make them applicable to cases which are within the reason and spirit of the enactment, though not within its direct words, they should receive such a construction, provided it is not inconsistent with the language employed.... In the class of statutes which may be construed retrospectively are those which create a new remedy, or enlarge the existing remedy for existing causes of action.

Id. at 404-410.

Explaining that it is also the norm to apply new procedures to pre-existing claims:

> Statutes regulating the procedure of the courts will be construed as applicable to causes of action accrued, and actions pending and undetermined, at the time of their passage, unless such actions are expressly excepted, or unless vested rights would be disturbed by giving them a retrospective

> operation.

Id. at 108.

2. C. Endlich, Commentary on the Interpretation of Statutes (1888)

Defining narrowly the presumption against retroactivity:

> Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation.... It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question prevails.

Id. at 362-67

Stating that the opposite rule of construction prevailed for new legislation regarding the means of enforcing existing rights:

> [T]he presumption against a retroactive construction has no application to enactments which affect only the procedure and practice of the Courts ..., even where the alteration which the statutes make has been disadvantageous to one of the parties.... The remedy does not alter the contract or the tort; it takes away no vested right for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective remedy.... The general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it.

Id. at 386-7.

Citing as examples of statutes presumptively applicable to pending claims:

> laws changing the forum in which a claim is to be determined, *id.* at 387;
>
> provision of new remedies for existing rights, *id.* at 388;
>
> provision for or limiting of costs, *id.* 388;
>
> provision for or limiting of counsel fees, *id.* at 388, 390;
>
> extending the period of limitations, *id.* at 390.

3. W.G. Myer, Vested Rights (1891)

Emphasizing that retroactivity "in a legal sense" did not encompass many applications of new legislation to pre-existing claims:

> The general rule is, that a statute will not be construed as retroactive in its operation, unless the intention that it shall so act appears on its face.... It is to be understood, of course, that the rule applies to such laws only as are retrospective in a legal sense, and not such as are simply curative or remedial.... Statutes which are remedial in their effect will be given a retrospective operation, unless the contrary intent appears.... The rule as to remedial statutes is stated thus: Statutes are, in the absence of directions to the contrary, retrospective in their operation whenever they

> are remedial, as where they create new remedies for existing rights....

Id. at 18.

4. H. Broom, Legal Maxims (8th ed. 1911)

> No suitor ... has a vested interest in the course of procedure, or a right to complain, if during his litigation the procedure is changed, provided that no injustice be done. Alterations in the form of procedure are always retrospective, unless there be some good reason to the contrary; and so are alterations in the law of evidence in matters both civil and criminal.

Id. at 27.

5. 59 Corpus Juris §§ 696, 700, at. 1171-74 (1932)

> Retroactive legislation changing rights is not favored, and the rule that statutes are not to be construed retrospectively unless such construction was plainly intended by the legislature applies with peculiar force.... A difference is recognized between statutes affecting substantial rights and those affecting only procedure.... The general rule that statutes will be construed to be prospective only ... ordinarily does not apply to statutes affecting remedy or procedure.... [I]n the absence of directions to the contrary statutes merely affecting the remedy or law of procedure apply to actions thereafter, whether the right of action accrued before or after the

change in the law.

Id. See also 82 *C.J.S.* Statutes §§ 421-25, at. 976-1001.

6. 50 American Jurisprudence "Statutes" § 482, at 505-06 (1944)

Emphasizing that the word "retrospective" had a special "legal sense" related to vested rights and new duties:

> A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. Hence, remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. To the contrary, statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending. A fortiori, a statute or amendment which furnishes a new remedy, but does not impair or affect any contracted obligations or disturb vested rights, is applicable to proceedings begun after its passage, though

> relating to acts done previously thereto.

73 *Am. Jur.* 2d "Statutes" § 354-55, at 489-91.

APPENDIX K

Colorado, Montana, New Hampshire, and Ohio Cases Interpreting the Respective State Constitutional Provision Prohibiting "Retroactive" Statutes

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Colorado

Article 2, § 11 of the Colorado Constitution provides that, "[n]o ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly."

Continental Title Co. v. District Ct., Etc., 645 P.2d 1310, 1315 (1982) ("Application of a statute to a subsisting claim for relief does not violate the prohibition of retroactive legislation where the statute effects a change that is only procedural and remedial in nature.")

People v. Board of Trustees of Firemen's Pension Fund, 82 P.2d 765, 771 (1938) (retrospective act is defined as "one which takes away or impairs vested rights acquired under existing laws. . . .")

Moore v. Chalmers-Galloway Live Stock Co., 10 P.2d 950, 952 (1932) ("the abolition of an old remedy or the substitution of a new one" is not considered as "impairing a vested right or imposing a new duty," and therefore does not constitute a retrospective act)

Evans v. City of Denver, 57 P. 696, 697 (1899) (a retrospective statute is defined as one which "abrogates an existing right of action or defense. . . .")

Perry v. City of Denver, 59 P. 747, 748 (1899) (a retrospective law is defined as one "which takes away or impairs vested

rights acquired under existing laws. . . .")

French v. Deane, 36 P. 609, 613 (1894) (defining "[a] statute which takes away or impairs any vested right. . . . " as "retrospective or retroactive.")

Montana

Article XIII, § 1(3) of the Montana Constitution provides that, "[t]he legislature shall pass no law retrospective in its operations which imposes on the people a new liability in respect to transactions or considerations already passed."

Neel v. First Federal Sav. and Loan Assoc., 675 P. 2d 96, 101 (Mont. 1984) ("A retroactive law is one which '[T]akes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions already past.'")

Castles v. State Ex Rel. Mont. Dept. of Highways, Mont., 609 F.2d 1223, 1225 (1980) ("Statutes that modify the procedure for exercising a vested right or carrying out a duty do not constitute retroactive legislation.")

Continental Oil Co. v. Montana Concrete Co., 207 P. 116, 118 (1922) (a retroactive law as proscribed by the constitution is one which "takes away or impairs vested rights acquired under existing laws. . . .")

New Hampshire

Part I, Article 23d of the New Hampshire Constitution states that, "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil cases, or the punishment of offenses."

Gould v. Concord Hospital, 126 N.H. 405, 408 (1985) (a retrospective law as prohibited by the constitution, is one which "impairs a vested legal right.")

Socha v. City of Manchester, 126 N.H. 289, 291 (1985) ("To be retrospective [as prohibited by the constitution] a statute must impair a vested legal right.")

Gelinas v. Mackey, 123 N.H. 690, 695 (1983) ("A statute may apply to cases commenced but not yet decided when it is enacted, if it is remedial or procedural in nature.")

Lozier v. Brown Co., 121 N.H. 67, 70 (1981) ("Statutes that apply to remedies do not come within this constitutional prohibition [against retroactivity] and may be applied retroactively.")

Smith v. Sampson, 114 N.H. 638, 641 (1974) ("As such [remedial] statutes do not take away, impair, or affect those [substantive] rights, they do not come within the prohibition of N.H. Const. pt.I, art. 23 against retrospective laws.")

Simpson v. Savings Bank, 56 NH 466, 471 (1876) (a law which retroacts upon a past transaction, but affects the remedy only and does not affect it "injuriously, oppressively, or unjustly," is not considered retroactive within the meaning of the constitutional prohibition)

Rich v. Flanders, 39 N.H. 304, 322 (1859) ("[A]ny statute which changes or affects the remedy, and does not destroy or impair any vested right - which does not destroy any existing right of action or of defence, or create any new ground of action or of defence, is not a retrospective law in the sense in which such laws are prohibited by the constitution. . . ."

Willard v. Harvey, 24 N.H. 344, 353 (1852) ("[A] statute which changes or modifies the remedy of a party for the

recovery of his claim, which limits or restricts the process by which it is to be enforced . . . is not within the prohibition of the Constitution as a retrospective law. . . .")

Clark v. Clark, 10 N.H. 380, 386 (1839) (defining as retrospective a law which "tak[es] away or abrogat[es] a perfect existing right, although no suit or legal proceeding then exists.")

Ohio

Article II, § 28 of the Ohio Constitution provides in part that, "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts. . . . "

State Ex Rel. McGovern v. Board of Elections, 263 N.E. 2d 586, 588 (1970) ("Retroactive laws have been defined as those which take away a vested right, or impose a new obligation or duty or disability with respect to transactions already passed")

Lash v. Mann, 49 N.E. 2d 689, 692 (1943) ("It is a general rule that there is no vested right in an existing remedy . . . and that a Statute subsequently passed may alter, modify or curtail such remedy provided a reasonable time is given for the assertion of the remedy.")

Weil v. Taxicabs of Cincinnati, 39 N.E. 2d 148 (1942) (the Constitutional provision prohibiting the passage of retroactive laws applies to laws disturbing substantive rights as distinguished from laws merely changing the remedy for the enforcement of those rights)

Columbian Building & Loan Co. v. Meddles, 35 N.E. 2d 902, 904 (1941) ("[parties to a contract] have no vested interest . . . as to the forms of action or modes or remedy. The Legislature may change these at its discretion, provided

adequate means for enforcing the right remains.")

State v. Zangerle, 14 N.E. 2d 932, 934 (1938) ("[E]very Statute that is designed to act retrospectively is not retroactive within the terms . . . of the constitution of 1851, which forbids the general assembly of this state to pass 'retroactive' laws. Whether a statute falls within the prohibition of this provision of the constitution depends upon the character of the relief that it provides. If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of this state.")

City of Cincinnati v. Bachmann, 199 N.E. 853, 854-55 (1935) (holding that new remedies may be given for enforcing existing rights without violating Constitutional and statutory inhibitions on retroactivity)

Gray v. City of Toledo, 89 N.E.D 12, 13 (1909) (adopted Justice Story's definition of a retrospective law, which provides that, "every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Miller v. Hixson, 59 N.E. 749, 752 (1901) (a statute which imposes a new or additional burden, duty, obligation, or liability as to past transactions is retroactive and void under the State Constitution)

Rairden and Burnett v. Holden, 15 Ohio St. 207, 210 (1864) (adopting Justice Story's definition of a retrospective law, which provides, "[u]pon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

APPENDIX L

Other State Cases Interpreting Prohibitions on "Retroactive" Statutes

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Alabama

Harlan v. State, 18 So. 2d 744, 747 (1944) ("The general rule prevails that unless expressly prohibited or unless some contractual rights are intervened, a statute which is remedial or procedural by its terms and provisions applies whether the cause of action accrued or had its inception before or after the effective date of the act.")

California

Davis & McMillan v. Industrial Accident Comm'n, 246 P. 1046, 1048 (1926) ("'Retrospective statutes are usually considered to embrace only those which relate to substantial rights, as those which destroy or impair an existing right, or give a right which never before existed; and statutes which affect remedies only are not within the scope of the inhibition against retrospective laws, unless the remedy is entirely taken away, or is encumbered with conditions which render it impracticable.'")

Illinois

Fireside Chrysler-Plymouth v. Chrysler, 472 N.E. 2d 861, 866 (Ill.App.Ct. 1984) (establishing that a "retroactive law" is "one that impairs vested rights," the Court went on to define a "vested right" as "more than a mere expectation based upon an anticipated continuance of existing law; it must have become a fixed right, complete and consummated."

Michigan

Stott v. Stott Realty Co., 284 N.W. 635, 640 (1939) ("The

constitutional prohibition of the passage of retroactive laws, Const. art. 239, refers only to retroactive laws that injuriously affect some substantial or vested right, and 'does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce an account of defects in the law or its omission to provide the relief necessary to secure such right.'")

Missouri

Swedge v. Kansas City, St. L & C.R. Co., 53 S.W.2d 284, 288 (1932) (legislation going to the remedy "is not a retrospective law within the meaning of that term as used in the Constitution.")

North Carolina

B-C Remedy Co. v. Unemployment Compensation Comm'n, 36 S.E. 2d 733, 737 (1946) (remedial statutes may be applied retroactively "in the absence of directions to the contrary when they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses . . . unless in doing this we violate some contract obligation or divest some vested right.")

Oklahoma

In re Ross, 207 P.2d 254, 256 (1949) ("[A] retrospective or retroactive law is one which takes away or impairs vested or accrued rights under existing laws.")

Tennessee

Baker v. Rose, 56 S.W.2d 732, 734 (1933) ("A retrospective law within [the] constitutional inhibition, is one which infringes or divests vested rights.")

Texas

McCain v. Yost, 284 S.W.2d 898, 900 (1955) ("A statute cannot be said to be a retroactive law prohibited by the constitution unless it can be shown that the application of the law would take away or impair vested rights acquired under existing law.")

De Cordova v. City of Galveston, 4 Tex 470, 479-80 (1849) ("Laws are deemed retrospective and within the constitutional prohibition which by retrospective operation destroy of impair vested rights . . . but laws which affect the remedy merely are not within the scope of the inhibition unless the remedy be taken away altogether or incumbered with conditions that would render it useless or impracticable to pursue it.")

APPENDIX M

Prior View of Roadway Counsel
Glen D. Nager Expressed in Legislative History of Civil Rights Act of 1991

Counsel for Roadway, Glen D. Nager, together with Laurie W. Finneran, both of Jones Day, Reavis & Pogue, wrote:

> The Supreme Court has espoused the principle that "a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). Courts generally will not find "manifest injustice" where "there [is] no change in the substantive obligation of the parties." *Id.* at 721; *see also Hallowell v. Commons*, 239 U.S. 506, 508 (1916). Therefore, as a matter of statutory construction, courts distinguish between statutes that affect only procedures and remedies, which presumptively apply to the pending litigation, and statutes that affect substantive rights, which did not enjoy a presumption of retroactivity.

> "The purpose behind this rule of construction is clear. [Although] [n]on-retrospective application of statute prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed, [t]his danger is not present where statutes merely affect *remedies or procedures*." *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985).

137 Cong. Rec. S 15959 (daily ed. Nov. 5, 1991) (Emphasis added).

APPENDIX N

Court of Appeals Decisions Applying New Statutes Providing Additional Remedies for Conduct Already Illegal Under Other Law

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Decisions Applying in Pending Cases the Provision in the 1972 Civil Rights Act Authorizing Damages Against the Government

1. *Koger v. Ball*, 497 F.2d 702, 705 - 07 (4th Cir. 1974) (explaining that "the 1972 Act did not create a new substantive right for federal employees" but rather provided them with a new remedy for their already existing right to be free from racial discrimination in employment which dated back at least to a 1969 Executive Order.)

2. *Womack v. Lynn*, 504 F.2d 267, 269 & n.5 (D.C. Cir. 1974) (applying new provision because it "is merely a procedural statute that affects the *remedies* available to federal employees suffering from employment discrimination." Relying on executive orders dating back to 1948, the court concluded that "[t]heir *right* to be free of such discrimination has been assured for years.") (Emphasis in original).

3. *Thompson v. Sawyer*, 678 F.2d 257, 287 - 88 (D.C. Cir. 1982) (explaining that the 1972 Amendments to Title VII were for federal workers "a new means to enforce their preexisting right to be free from discrimination" that dated back at least to a 1969 Executive Order.)

4. *Sperling v. United States*, 515 F.2d 465, 471 n.14, 473 - 74 (3d Cir.), *cert. denied*, 426 U.S. 919 (1975) (applying new provision as a new remedy for a right dating back to executive orders since 1948, and describing it as "a classic example of a procedural or remedial statute applicable to cases pending at the time of enactment").

5. *Adams v. Brinegar*, 521 F.2d 129, 131 - 32 (7th Cir. 1975) (explaining that based on the Fifth Amendment and executive orders dating back to 1948 the "right of federal employees to seek relief from racial discrimination by the federal government was thus available some years before . . . 1972. Section 717(c) simply provided one more step in the existing review process.")

7. *Mahroom v. Hook*, 563 F.2d 1369, 1373 (9th Cir. 1977) (relying on reasoning in *Koger* and *Womack* in applying 1972 Amendments to pending cases), *cert. denied*, 436 U.S. 904 (1978)

8. *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 367 n.5 (5th Cir. 1977) (applying 1972 amendments to pending cases)

9. *Huntley v. Department of Health, Education and Welfare*, 550 F.2d 290, 295 (5th Cir.), *cert. denied*, 434 U.S. 985 (1977) (same)

10. *Allen v. United States*, 542 F.2d 176, 177 n.2 (3rd Cir. 1976) (same)

11. *Weahkee v. Powell*, 532 F.2d 727, 729 (10th Cir. 1976) (endorsing reasoning in *Koger* and *Womack*)

12. *Ettinger v. Johnson*, 518 F.2d 648, 651 n.71 (3rd Cir. 1975) (relying on *Sperling, Koger and Womack*)

13. *Brown v. General Services Administration*, 507 F.2d 1300, 1305-06 (2d Cir. 1974), *aff'd* 425 U.S. 820 (1976) (endorsing reasoning of *Womack* and *Koger*)

Decisions Applying in Pending Cases the 1974 Amendments to Age Discrimination in Employment Act

1. *Bunch v. United States*, 548 F.2d 336, 339 (9th Cir. 1977) (concluding that "[t]he age discrimination policy, like the anti-discrimination policy of Title VII, was seriously hampered by the lack of any effective enforcement machinery prior to the amendments in issue. The ADEA amendments, like the 1972 Title VII amendments, did not create new substantive rights, but simply created new procedures and remedies" for vindicating pre-existing rights granted in earlier executive orders) (citations omitted).

Decisions Applying in Pending Cases the 1974 and 1977 Amendments to the Fair Labor Standards Act

1. *Bush v. State Industries, Inc.*, 599 F.2d 780, 786 (6th Cir. 1979) (finding the 1977 amendment applicable because "[a]n employee's right to be free from discharge or other employment discrimination for attempting to have enforced the provisions of the FLSA has been protected for years. The amendment. . . did not create new substantive rights, but simply affected the remedies available to employees for vindication their pre-existing rights.")

APPENDIX O

Decisions Citing to Legislative History in Which Members of Congress Expressed Their Reliance on *Bradley v. Richmond Sch. Bd.*

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1. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1554 (11th Cir. 1984) (Sen. Kennedy, Rep. Sensenbrenner)

2. *People of State of Illinois v. I.C.C.*, 698 F.2d 868, 872 (7th Cir. 1983) (Conference Report)

3. *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 603-04 (7th Cir. 1982) (House Report)

4. *Alphin v. Henson*, 552 F.2d 1033, 1035 n.3 (4th Cir. 1977) (Sens. Hart and Abourezk)

5. *Finney v. Hutto*, 548 F.2d 740, 742 n.5 (8th Cir. 1977) (Rep. Drinan), *aff'd*, 437 U.S. 678 (1978)

6. *Rainey v. Jackson State College*, 551 F.2d 672, 676 n. 5 (5th Cir. 1977) (Sen. Abourezk, House Report)

7. *Stanford Daily v. Zurcher*, 550 F.2d 464, 466 (9th Cir. 1977) (House Report)

8. *Wharton v. Knefel*, 562 F.2d 550, 557 n.33 (8th Cir. 1977) (Sen. Kennedy, House Report)

Nos. 92-757 and 92-938

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF, PETITIONER

v.

USI FILM PRODUCTS, ET AL.

MAURICE RIVERS, ET AL., PETITIONERS

v.

ROADWAY EXPRESS, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Sections 101 and 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, apply to claims that were pending on the date of enactment.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF, PETITIONER

v.

USI FILM PRODUCTS, ET AL.

No. 92-938

MAURICE RIVERS, ET AL., PETITIONERS

v.

ROADWAY EXPRESS, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the application of the Civil Rights Act of 1991 (Act) to claims that were pending on November 21, 1991, the effective date of the Act. The Act amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as well as 42 U.S.C. 1981. The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share substantial re-

sponsibility for the enforcement of Title VII. In addition, the United States is a defendant in Title VII actions brought by federal employees. The Court's resolution of the question presented in these cases may also affect the application of other statutes enforced by the United States.

STATEMENT

1. In No. 92-757, petitioner Barbara Landgraf was employed by USI Film Products in Tyler, Texas, from September 1984 through January 1986. Throughout her employment, John Williams, a male co-worker, subjected her to "continuous and repeated inappropriate verbal comments and physical contact." 92-757 Pet. App. A2. Landgraf complained repeatedly about the harassment to her direct supervisor, who took no action. Eventually, she reported the harassment to the personnel manager. The personnel manager investigated and found that four other women "corroborated Landgraf's reports of Williams' engaging in inappropriate touching and three women reported verbal harassment." *Ibid.* Williams was not suspended or dismissed, as USI's policy required, but instead received a written reprimand and was transferred to another department. *Ibid.* Shortly thereafter, Landgraf resigned from the company and filed a charge of discrimination with the EEOC.

On July 21, 1989, Landgraf filed suit against USI alleging that she had been sexually harassed and constructively discharged in violation of Title VII. On May 22, 1991, following a bench trial, the district court entered judgment for the respondents. 92-757 Pet. 3-4. The court found that Landgraf had demonstrated that the sexual harassment "was severe enough to make USI a 'hostile work environment' for purposes of Title VII liability." 92-757 Pet. App. A2. The court nevertheless ruled that she was not entitled to any relief, because it found that she had not been constructively discharged as a result of the harassment. The district court found that

"the sexual harassment by Williams was not severe enough that a reasonable person would have felt compelled to resign," *id.* at A4, and that Landgraf in fact resigned because of problems with her co-workers that were unrelated to the Title VII violation, *id.* at A4-A5.

Landgraf appealed, arguing that the district court erred in finding that she had not been constructively discharged. On November 21, 1991, while her appeal was pending, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Landgraf's counsel notified the court of appeals of the potential applicability of the new Act to her case, asserting that Sections 102(a)(1) and 102(c) of the Act entitled her to compensatory and punitive damages and the right to a jury trial. 92-757 Pet. App. A2.

The court of appeals affirmed. 92-757 Pet. App. A1-A10. It agreed that Landgraf had "suffered significant sexual harassment" that was "sufficiently severe to support a hostile work environment claim under Title VII." 92-757 Pet. App. A3 (citing *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986)). The court of appeals agreed with the district court, however, that the sexual harassment was "insufficient to support a finding of constructive discharge." *Id.* at A5.

The court of appeals held that the enactment of the Civil Rights Act of 1991 did not entitle Landgraf to a jury trial in which she could seek compensatory and punitive damages. 92-757 Pet. App. A8-A10. The court first concluded that "there is no clear congressional intent on the general issue of the Act's application to pending cases." *Id.* at A8 (citing *Johnson* v. *Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), petition for cert. pending, No. 92-737 (filed Sept. 29, 1992)). The court then noted that the principles governing the application of new statutes to pending cases are "somewhat uncertain" in light of this Court's decisions in *Bradley* v. *School Board*, 416 U.S. 696 (1974), and *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988).

The court did not resolve this apparent conflict, however, because it found that even under the *Bradley* standard, the new provisions should not be applied in this case. 92-757 Pet. App. A8-A9.

The court was "not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial." 92-757 Pet. App. A9. The court also concluded that it would be a "manifest injustice" to allow Landgraf to collect compensatory or punitive damages under the new Act, finding that "the amended damage provisions of the Act are a seachange in employer liability for Title VII violations." 92-757 Pet. App. A9-A10.

2. In No. 92-938, petitioners Maurice Rivers and Robert Davison, who are black, were hired as garage mechanics by Roadway Express, Inc., in the early 1970s. In August 1986, Roadway managers directed Rivers and Davison to attend a disciplinary hearing about their work records. 92-938 Pet. App. 2a. Rivers and Davison refused to attend the hearing on the ground that Roadway had failed to provide adequate written notice pursuant to the terms of a collective bargaining agreement. Roadway held the hearing anyway and suspended both petitioners for two days. Petitioners then filed and won grievances challenging the lack of notice. *Ibid.* Shortly thereafter, Roadway's labor relations manager announced that he would hold disciplinary hearings within 72 hours. Rivers and Davison again refused to attend, alleging inadequate notice. On September 26, 1986, Roadway discharged Rivers and Davison, purportedly on the basis of their work records and their refusal to attend the hearings. *Id.* at 3a.

Rivers and Davison filed suit in February 1987, alleging, *inter alia*, that Roadway had discriminated against them on the basis of race in violation of 42 U.S.C. 1981 and Title VII. Petitioners argued that the discharges were racially motivated, and that they were fired in retaliation for enforcing their contractual rights in the grievance hearing in violation of Section 1981. The district court

initially denied Roadway's motion for summary judgment, but dismissed petitioners' Section 1981 discharge and retaliation claims after this Court decided *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). 92-938 Pet. App. 3a-4a, 23a-24a. The district court then held a bench trial on the Title VII claims. On October 18, 1990, the court entered judgment for respondent, finding that petitioners had failed to establish that their terminations were racially motivated. *Id.* at 4a; 92-938 Br. in Opp. App. A1-A13.

Petitioners appealed the dismissal of their Section 1981 claims, arguing that *Patterson* does not preclude a retaliatory discharge claim arising from attempts to enforce contractual rights. While the appeal was pending, Congress passed the Civil Rights Act of 1991. Rivers and Davison then argued that the new Act, reversing the effect of *Patterson*, should be applied to their Section 1981 claims. 92-938 Pet. App. 2a, 4a, 11a.

The court of appeals affirmed in part and reversed in part. 92-938 Pet. App. 1a-14a. It concluded that *Patterson* did not preclude petitioners' Section 1981 claim that they were fired in retaliation for attempting to enforce their contract rights. *Id.* at 7a-9a. The court of appeals affirmed the district court's dismissal of the discriminatory discharge claims under Section 1981, however, holding that *Patterson* applied to claims that were pending at the time of that decision. *Id.* at 6a.

The court also held that the Civil Rights Act of 1991 does not apply to claims that were pending at the time of enactment. 92-938 Pet. App. 11a-14a. The court noted the seemingly conflicting rules of construction established in *Bradley* and *Bowen*, and concluded that the legislative history of the Act "sheds little light on the matter, as Senators expressed conflicting views and no legislative committee reports exist explaining the bill." *Id.* at 11a-12a (citing *Mozee* v. *American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), cert. denied,

113 S. Ct. 207 (1992); *Fray* v. *Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel* v. *City of Cincinnati*, 959 F.2d 594 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992)). Following *Vogel*, the court held that *Bradley* does not apply where "substantive rights and liabilities" would be affected. 92-938 Pet. App. 13a. The court concluded that application of the Civil Rights Act of 1991 to petitioners' claims would "adversely affect substantive rights and liabilities." 92-938 Pet. App. 14a. The court rejected petitioners' argument that the retroactivity analysis depends upon the particular section at issue, and not whether the Act as a whole is considered retroactive. *Ibid.*[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Civil Rights Act of 1991 primarily to provide new procedures and remedies to victims of discrimination, including compensatory and punitive damages and jury trials under Title VII. The Act was largely a response to a series of decisions of this Court that Congress viewed as unduly restricting the relief available to plaintiffs alleging violations of their civil rights. The Act "creates few new rules against discrimination, focusing instead on outlining new procedures and remedies to use in new trials." *Mojica* v. *Gannett Co.*, Nos. 91-3921 & 92-1104 (7th Cir. Mar. 4, 1993), slip op. 9 (Cummings, J., dissenting from order granting rehearing en banc).

These cases present the question whether Sections 101 and 102 of the Act apply to cases that were pending on the date of enactment, as well as to cases filed after the date of enactment challenging pre-enactment con-

[1] Judge Siler dissented from the court's ruling that *Patterson* does not exclude claims under Section 1981 based on retaliation for attempting to enforce contract rights. 92-938 Pet. App. 14a-16a. That question is not at issue in this Court, which limited its grant of certiorari to the retroactivity question.

duct. In answering that question, the first step is to determine, if possible, what Congress intended. "[W]here the congressional intent is clear, it governs." *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990).

A textual analysis of the Act indicates that Sections 101 and 102 apply to pending cases. Sections 109(c) and 402(b) expressly limit the retroactive effect of specified provisions of the Act. 105 Stat. 1078, 1099. Moreover, Section 402(a) states that, "[e]xcept as otherwise specifically provided, this Act * * * shall take effect upon enactment." 105 Stat. 1099. Failure to apply the other provisions of the Act to pending cases would render the qualifying clause "[e]xcept as otherwise specifically provided" unnecessary, in contravention of "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992).

The legislative history of the Act does not contradict that analysis. Individual legislators addressed the retroactivity issue, but disagreed on how it should be resolved. Although the President vetoed an earlier bill containing an express retroactivity provision, Congress in turn failed to pass several bills containing express anti-retroactivity provisions.

Even if the text of the Act were not clear on the point, it would be appropriate to apply Sections 101 and 102 to pending cases. In deciding whether new statutes should govern pre-enactment conduct in the absence of clear evidence of congressional intent, courts have perceived a conflict between *Bradley* v. *School Board*, 416 U.S. 696 (1974), and *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). In *Bradley*, a case involving attorney's fees, the Court affirmed "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest

injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. In *Bowen*, in which the Department of Health and Human Services attempted to recapture payments made to hospitals under prior regulations, the Court said that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at 208.

These cases can be reconciled. In *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), the Court held that the "substantive provisions of the 1978 Amendments to Title I of the Elementary and Secondary Education Act" do not apply to funds spent more than six years before enactment. 470 U.S. at 633-634. The Court distinguished the case from *Bradley*, relying on a "venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639.

Bennett suggests a rule that is both fair and consistent with Congress's purpose in enacting new legislation: when Congress has not prescribed how new statutes are to be applied to pending cases, substantive provisions (such as those prohibiting conduct that was not illegal before) should not be applied to pending cases. On the other hand, procedural and remedial provisions may be applied to pending cases unless doing so would result in "manifest injustice." *Bradley*, 416 U.S. at 711. In most cases, it is not manifestly unjust to allow victims of discrimination to benefit from the remedies or procedures that Congress has authorized. In particular, there is no injustice in requiring the wrongdoer, rather than the victim, to bear the costs of injury caused by discriminatory conduct that was unlawful at the time it occurred.

In our view, the provisions of the Civil Rights Act of 1991 at issue here should be applied to petitioners' claims. Landgraf seeks damages for sexual harassment that the

district court found constituted a violation under existing law. She was denied a remedy for the harassment, even though both lower courts found it to be "significant" and "severe." 92-757 Pet. App. A2-A3. Allowing her compensation for her injury, as Congress provided in Section 102, comports with basic notions of fairness. Similarly, the *Rivers* petitioners asserted a cause of action under Section 1981 for discriminatory discharge, which the district court dismissed after this Court decided *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). In enacting Section 101, Congress plainly registered its dissatisfaction with this Court's decision in *Patterson*. Because Congress clearly intended to deny *Patterson* further effect, and because in the present context Section 101 provides a remedy for conduct that was illegal under Title VII, the new Act should be applied to petitioners' claims.[2]

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[2] Shortly after the Act was passed, the EEOC issued a Policy Guidance announcing that the EEOC would not process charges for damages for conduct that occurred before November 21, 1991. EEOC Policy Document No. 915.002, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991). That document did not purport to explain an area in which the EEOC has expertise (*i.e.*, Title VII). Instead, it represented the EEOC's analysis of this Court's decisions on retroactivity. The EEOC's initial conclusion that it would follow *Bowen* because it was decided after *Bradley* does not preclude a different analysis here, particularly in light of the EEOC's recent rescission of the Policy Guidance. EEOC Policy Document No. 915.002, Rescission of Policy Guidance on Application of Damages Provisions of the Civil Rights Act to Pending Charges and Pre-Act Conduct (Apr. 19, 1993).

In addition, the United States has taken the position in a number of lower courts that the provisions of the Act generally do not apply to conduct that occurred before its effective date. See, *e.g.*, U.S. Br. in *Van Meter* v. *Barr*, No. 92-5046 (D.C. Cir.); U.S. Br. in *Mojica* v. *Gannett Co.*, Nos. 91-3921 and 92-1104 (7th Cir.). We have re-examined our position and have concluded that it is

ARGUMENT

SECTIONS 101 AND 102 OF THE CIVIL RIGHTS ACT OF 1991 APPLY TO CLAIMS THAT WERE PENDING AT THE TIME OF ENACTMENT

The President signed the Civil Rights Act of 1991 into law on November 21, 1991. Congress found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." § 2, 105 Stat. 1071. Accordingly, the Act "provide[s] appropriate remedies for intentional discrimination and unlawful harassment in the workplace." § 3, 105 Stat. 1071. Many provisions of the Act "respond to recent decisions of [this] Court by expanding the scope of relevant civil rights statutes in order to provide adequate protections to victims of discrimination." *Ibid.*

The Act comprises a variety of provisions addressing different issues that have arisen under the civil rights statutes in recent years. Section 101 of the Act responds to *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and provides that the phrase "make and enforce contracts" in 42 U.S.C. 1981 includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 105 Stat. 1072. Section 102 amends Title VII to allow victims of discrimination to seek compensatory and punitive damages, and permits either party to seek a jury trial if such damages are sought. 105 Stat. 1072.[a] Sections 104 and 105, 105 Stat. 1074, respond to this Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), and govern burdens of proof in disparate impact cases. Section 106, 105 Stat. 1075, prohibits altering the results of employment-related test scores on the basis of race, color, religion, sex, or national origin. Section 107, 105 Stat. 1075-1076, addresses the type of "mixed motive" case at issue in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), and limits relief where the employer proves that the same action would have been taken in the absence of the discrimination. Section 108, 105 Stat. 1076-1077, responds to *Martin* v. *Wilks*, 490 U.S. 755 (1989), by limiting the ability of non-parties who received adequate notice to challenge Title VII judgments and consent decrees. Section 109, 105 Stat. 1077-1078, responds to *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), by extending Title VII to U.S. citizens working abroad. In Section 113, 105 Stat. 1079, Congress expanded the definition of attorney's fees to include expert fees.

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both incorrect and contrary to the longstanding position of the government with respect to statutory retroactivity. See, *e.g.*, U.S. Br. at 17 in *Bennett* v. *New Jersey*, No. 83-2064 ("statutes affecting substantive rights or obligations are considered prospective only," while statutes "involving procedures, remedies, or prospective relief * * * appl[y] to pending cases"); *United States* v. *Murphy*, 937 F.2d 1032, 1037-1038 (6th Cir. 1991) (amendments to False Claims Act, 31 U.S.C. 3729-3733); *United States* v. *Singer Co.*, 889 F.2d 1327, 1333-1334 (4th Cir. 1989) (same); *Schalk* v. *Reilly*, 900 F.2d 1091, 1096 (7th Cir. 1990) (amendments to Comprehensive Environmental Response, Compensation, and Liability Act of 1980); *United States* v. *Monsanto Co.*, 858 F.2d 160, 175 (4th Cir. 1988) (same); *Reding* v. *FDIC*, 942 F.2d 1254, 1256-1257 (8th Cir. 1991) (Financial Institutions Reform, Recovery, and Enforcement Act of 1989); *FDIC* v. *Wright*, 942 F.2d 1089, 1094-1097 (7th Cir. 1991) (same).

[a] Section 102 permits a plaintiff to recover compensatory and punitive damages in an amount limited by the size of the employer. Plaintiffs may recover no more than $50,000 if the employer has 15 to 100 employees, no more than $100,000 if the employer has more than 100 but fewer than 201 employees, no more than $200,000 if the employer has more than 200 but fewer than 501 employees, and no more than $300,000 if the employer has more than 500 employees. § 102(b)(3), 105 Stat. 1073. No punitive damages may be awarded against government entities. § 102(b)(1), 105 Stat. 1073.

A. Textual Analysis Of The Act Indicates That, Except As Otherwise Specifically Provided, The Act Applies To Pending Cases

The issue in these cases is whether particular provisions of the Act—Sections 101 and 102—apply to cases that were pending on the date of enactment and that arise out of conduct that occurred before the date of enactment. The issue is often framed in terms of whether the provisions of the Act apply "retroactively."[4] The first step in the inquiry is to determine, if possible, the intent of Congress. "[W]here the congressional intent is clear, it governs," subject only to constitutional limitations. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990) (citing *Bradley* v. *School Board*, 416 U.S. 696, 716-717 (1974), and *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988)). "The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative

[4] The terminology used in this area—"retroactive" (or its synonym, "retrospective") versus "prospective" application of law—is not always used consistently. The classic definition was stated by Justice Story in *Society for the Propagation of the Gospel* v. *Wheeler*, 22 Fed. Cas. 756, 757 (C.C.D.N.H. 1814) (No. 13,156):

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.

Accord 2 N. Singer, *Sutherland Statutory Construction* § 41.01, at 337-338 (4th ed. 1986). This understanding holds whether the change in law occurs during the pendency of litigation, *e.g.*, *Greene* v. *United States*, 376 U.S. 149 (1964), or precedes any litigation, *e.g.*, *United States* v. *Security Indus. Bank*, 459 U.S. 70 (1982). It should be noted, however, that "retroactive" is sometimes defined more restrictively, to mean "the application of a change in law to overturn a judicial adjudication of rights that has already become final." *Kaiser Aluminum*, 494 U.S. at 864 (White, J., dissenting).

intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum*, 494 U.S. at 835 (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Textual analysis of the Act indicates that the Act applies to pending cases (and to cases filed after enactment based on pre-enactment conduct) except as otherwise specifically provided by Congress. Section 402 of the Act, the "Effective Date" provision, states:

> (a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
>
> (b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

105 Stat. 1099. In addition, Section 109(c), part of the section expanding Title VII's coverage to U.S. citizens working overseas, provides that "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." 105 Stat. 1078.

Sections 109(c) and 402(b) expressly limit the retroactive effect of specified provisions of the Act. The inclusion of those provisions suggests that the other provisions of the Act are retroactive. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Some courts have concluded that Sections 109(c) and 402(b) merely ensure that certain provisions of the Act will not be applied retroactively. See, *e.g.*, *Johnson* v. *Uncle Ben's, Inc.*, 965 F.2d at 1372-1373; *Mozee* v. *Ameri-*

can Commercial Marine Service Co., 963 F.2d 929, 932-933 (7th Cir.), cert. denied, 112 S. Ct. 207 (1992). But that construction of the statutory language is inconsistent with Section 402(a). Section 402(a) provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." 105 Stat. 1099. Standing alone, the phrase "shall take effect upon enactment" might mean that the Act applies retroactively, or merely that it applies to conduct that occurs on or after the effective date. As the Ninth Circuit recognized in *Estate of Reynolds* v. *Martin*, 985 F.2d 470 (1993), however, that ambiguity disappears when one considers the qualifying clause "[e]xcept as otherwise specifically provided." It is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). See also *Kungys* v. *United States*, 485 U.S. 759, 778 (1988). "The qualifying clause of Section 402(a), if it is to mean anything, must mean that the Act contains counterexamples that specifically provide for exceptions to the general rule enunciated elsewhere in section 402(a)." *Reynolds*, 985 F.2d at 473. The express prospectivity provisions of Sections 109(c) and 402(b) are the only plausible exceptions to the general rule of Section 402(a).[5] Accordingly, the text of the statute indicates that, except as otherwise

[5] In *Butts* v. *City of New York Dep't of Housing Preservation and Dev.*, No. 92-7850 (2d Cir. Mar. 24, 1993), the court suggested that the qualifying clause of Section 402(a) might apply to Section 204(b) (which requires the Glass Ceiling Commission to submit a report not later than 15 months after enactment) and to Section 303(b)(4) (which requires an official to be appointed within 90 days after enactment). 105 Stat. 1084, 1089. That suggestion is unpersuasive. The time periods specified in Sections 204(b) and 303(b)(4) began to run on November 21, 1991. Consequently, those provisions were effective upon enactment and cannot serve as counterexamples to the general rule of Section 402(a).

specifically provided (in Sections 109(c) and 402(b)), the Act applies to pending cases.

B. The Legislative History Does Not Express A Clear Legislative Intention That The Act Should Not Apply To Pending Cases

The legislative history of the Act does not undermine the foregoing textual analysis. No conference report or committee reports accompanied the Act. Although individual legislators addressed the retroactivity question, they did not agree on how it should be resolved. See *Fray* v. *Omaha World Herald Co.*, 960 F.2d 1370, 1376 n.10 (8th Cir. 1992) (collecting citations to conflicting statements and "interpretive memoranda" of various legislators). Any attempt to draw inferences from this welter of conflicting statements would validate the observation of the late Judge Leventhal that reviewing legislative history is like "looking over a crowd and picking out your friends." Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Indeed, Senator Danforth, an opponent of retroactivity, candidly stated (137 Cong. Rec. S15,325 (daily ed. Oct. 29, 1991)):

> [A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.

Most courts of appeals have heeded that warning and properly refused to accord any weight to the Act's legislative history, in which one can find ample support for either position.[6] In *Fray*, however, the Eighth Circuit

[6] See *Luddington* v. *Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir.), petition for cert. pending, No. 92-977 (filed Dec. 3, 1992); *Butts* v. *City of New York*, No. 92-7850 (2d Cir. Mar. 24, 1993), slip op. 2219; *Reynolds*, 985 F.2d at 477; *Baynes* v. *AT&T Technologies, Inc.*, 976 F.2d 1370, 1372 (11th Cir. 1992); *Gersman* v. *Group Health Ass'n*, 975 F.2d 886, 892 (D.C. Cir. 1992); *John-*

concluded that the legislative history demonstrated that Section 101 should not be applied retroactively because the President had vetoed an earlier bill containing an explicit retroactivity provision.[7] In that court's view, "[w]hen a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only." 960 F.2d at 1378. The Eighth Circuit overlooked the fact that Congress failed to pass bills containing explicit anti-retroactivity provisions.[8] Consequently, the legislative history does not reveal a clear congressional intention that the Act should not be applied retroactively.

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son, 965 F.2d at 1372; *Mozee*, 963 F.2d at 934; *Vogel* v. *City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992).

[7] In 1990, Congress passed a bill that expressly applied to pending cases, as well as to certain cases in which final judgment had been entered and the time to appeal had expired. H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 9 (1990). The President vetoed the bill and referred to the retroactivity provision as "unfair." 136 Cong. Rec. S16,419 (daily ed. Oct. 22, 1990). The veto was sustained.

[8] In early 1991, Senator Dole introduced a bill containing language expressly limiting the new provisions to conduct that occurred after enactment. 137 Cong. Rec. S3021, S3023 (daily ed. Mar. 12, 1991). The Senate never voted on the bill. In June 1991, Representative Michel proposed the same anti-retroactivity language as part of a substitute bill in the House, but the substitute was rejected by a vote of 266 to 162. 137 Cong. Rec. H3898, H3908 (daily ed. June 4, 1991).

Proposals to include express anti-retroactivity provisions in the 1990 bill were also unsuccessful. The Michel-LaFalce bill would have exempted all pre-existing claims from coverage. 136 Cong. Rec. H6746-H6747 (daily ed. Aug. 3, 1990). That bill was rejected by a vote of 238 to 188. 136 Cong. Rec. H6768 (daily ed. Aug. 3, 1990). Two other proposals to limit the retroactive effect of the legislation were also unsuccessful. See 136 Cong. Rec. H6786 (daily ed. Aug. 2, 1990) (statement of Rep. Moorhead); H.R. Rep. No. 644, 101st Cong., 2d Sess. Pt. 1, at 90 (1990).

Although individual legislators had different beliefs about the meaning of the Act, "those individual members' beliefs [are] unimportant, given the clear text of the Act." *Reynolds*, 985 F.2d at 478.

C. In The Absence Of Clear Evidence Of Congressional Intent, It Is Proper For Courts To Presume That Procedural And Remedial Provisions Apply To Pending Cases

Even if the textual analysis set forth above were not dispositive, it would nevertheless be appropriate to apply Sections 101 and 102 in these cases. Although this Court has noted an "apparent tension" in its prior decisions concerning the retroactive effect of statutes, *Kaiser Aluminum*, 494 U.S. at 837, the tension is just that—more apparent than real. Under this Court's decisions, the presumption against retroactive application of new statutes generally applies only to substantive provisions. In contrast, procedural and remedial provisions generally apply to pending cases and to cases filed after the effective date of the legislation.

1. In *Bradley* v. *School Board*, 416 U.S. 696 (1974), a unanimous Court held that the attorney's fee provisions of the Education Amendments of 1972 could be applied in a case pending on appeal to allow plaintiffs to recover attorney's fees incurred prior to the effective date of the Act. The Court relied on "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.[9]

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[9] The Court in *Bradley* relied on its prior decision in *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). In *Thorpe*, the Department of Housing and Urban Development had issued a circular while the petitioner's case was pending in this Court. The circular required local housing authorities to afford tenants in federally assisted housing projects prior notice of the reasons for an eviction

In *Bradley*, the Court identified three factors relevant to determining whether applying the law in effect at the time of the court's decision would result in manifest injustice: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. As to the first concern, the Court agreed with Chief Justice Marshall's statement in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801), that in "great national concerns * * * the court must decide according to existing laws," although the courts should "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties * * * in mere private cases between individuals." 416 U.S. at 717, 719. As to the second concern, the Court asked whether application of an intervening change in the law "would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720. The third concern "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Ibid.*

2. In *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), the Department of Health and Human Services (HHS) issued a cost-limit schedule under the Medicare Act that would have recouped payments already made to hospitals under an earlier version of the regulations. The Court unanimously held that HHS had no statutory authority to promulgate retroactive regulations. The Court observed that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at

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and an opportunity to respond. The Court held that the circular applied to petitioner, even though the housing authority had already secured an eviction order that had been affirmed by the North Carolina Supreme Court.

208 (citing *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164 (1944); *Miller* v. *United States*, 294 U.S. 435, 439 (1935); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928)).

3. In *Kaiser Aluminum*, 494 U.S. at 827, the Court considered whether the postjudgment interest provisions of the Federal Courts Improvement Act of 1982, amending 28 U.S.C. 1961, applied to judgments entered before the effective date of the Act. In *Kaiser Aluminum*, the Court was not required to "reconcile" the "apparent tension" between *Bradley* and *Bowen*, because the language of the statute "evidence[d] clear congressional intent that amended § 1961 is not applicable to judgments entered before its effective date." 494 U.S. at 837-838.

4. The Court's decision in *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), provides a basis for resolving the apparent tension between *Bowen* and *Bradley*. In *Bennett*, the Court held that the "substantive provisions" of the 1978 Amendments to Title I of the Elementary and Secondary Education Act did not apply "retroactively for determining if Title I funds were misused during the years 1970-1972." 470 U.S. at 633-634. The Court concluded that "[b]oth the nature of the obligations that arose under the Title I program and *Bradley* itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively." 470 U.S. at 638. The Court noted *Bradley*'s express limitation that an "intervening change" should not apply to a pending action when "to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 470 U.S. at 639 (quoting *Bradley*, 416 U.S. at 720). "This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639. See also *Greene* v. *United States*, 376 U.S. 149,

160 (1964) ("a retrospective operation will not be given to a statute which interferes with antecedent rights"); *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (same); *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (same).

Bennett is consistent with a long line of decisions of this Court applying new statutory provisions that are procedural or remedial in nature in pending litigation. See, *e.g.*, *Ex parte Collett*, 337 U.S. 55, 71 (1949) (*forum non conveniens* rule); *Bonet* v. *Texas Co.*, 308 U.S. 463, 467 (1940) (method of collecting compensation awards); *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916) (statute transferring jurisdiction from district court to executive agency); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879) (statute conferring exclusive authority on Secretary of the Interior); *Sampeyrac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833) ("Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed."). See also 2 N. Singer, *Sutherland Statutory Construction* § 41.04, at 349 (4th ed. 1986) (procedural statutes and remedial provisions that do not take away vested rights apply to pending actions); H. Black, *Handbook on the Construction and Interpretation of the Laws* § 120, at 403-408 (2d ed. 1911) (laws authorizing new or enlarged remedies for existing causes of action or changing rules of procedure or evidence apply to pending actions, unless vested rights would be disturbed).[10]

[10] The decisions discussed in Justice Scalia's concurring opinion in *Kaiser Aluminum*, see 494 U.S. at 842-844, are not to the contrary. Those decisions concerned the application of what were deemed to be statutes changing substantive rights, rather than procedural or remedial statutes, to pending cases. An article cited by Justice Scalia makes that point clear. See 494 U.S. at 842. The author of the article explains that retroactivity doctrine in the United States developed as "an inhibition against a construction which * * * would violate vested rights." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 784 (1936).

Accordingly, substantive changes—*e.g.*, a statutory change that makes illegal conduct that formerly was legal—should not be applied to a case in which the underlying conduct occurred before the statute's effective date. See *Bowen*, 488 U.S. at 204. But procedural or remedial changes should be applied to a pending case unless Congress has specified otherwise, or unless their application would result in "manifest injustice." *Bradley*, 416 U.S. at 711; *Thorpe*, 393 U.S. at 282. This approach to reconciling *Bradley* and *Bowen* focuses on the nature of the particular statutory provision at issue, rather than on the statute as a whole. It reflects the reality that Congress may enact statutes that contain a mixture of substantive, procedural, and remedial provisions. We therefore disagree with the suggestion (see 92-938 Pet. App. 14a) that courts should always make a single retroactivity determination for an entire statute.

We acknowledge that it will not always be obvious whether a provision should be classified as substantive, procedural, or remedial. But as the Court noted in another context in *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), "[t]he abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." In addition, we do not suggest that any new provision that may be labeled "remedial" or "procedural" must be applied to all pending cases. Courts have flexibility not to apply a new procedural or remedial provision in order to avoid manifest injustice.[11]

[11] In addition, a different presumption may be appropriate if the suit is against the government, because statutory waivers of sovereign immunity are strictly construed, and must be express rather than implied. See *United States Department of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *Ardestani* v. *INS*, 112 S. Ct.

D. Sections 101 and 102 Apply To Petitioners' Claims

1. *Section 102 Applies to Landgraf's Sexual Harassment Claims*

In *Landgraf*, both the court of appeals and the district court held that petitioner was sexually harassed in violation of Title VII. While the case was pending on appeal, Congress passed the Act. Section 102 of the Act permits victims of sexual harassment to recover compensatory and punitive damages, as well as backpay. The Act thus expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee's basic right to be free from discrimination or the employer's corresponding legal duty.

Because compensatory damages are an additional remedy for intentional misconduct that was illegal under Title VII before the effective date of the 1991 Act, applying the new provisions to pending cases is appropriate under *Bradley* and *Bowen*. "Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known." *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980) (removal of ceiling for workers' compensation disability is remedial and immediately applicable). See also *Womack* v. *Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974) (new remedy for discrimination applied to pending case because federal employees' "right to be free of such discrimination has been assured for years") (emphasis omitted). Thus, while "[r]etroactive creation of legal responsibilities or abolition of legal rights risks unfairness because the retroactive change confounds the expecta-

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515, 520 (1991). See also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit only by making its intention unmistakably clear in the language of the statute.").

tion upon which persons acted," changes in remedies "often do not involve the same degree of unfairness." *Hastings*, 628 F.2d at 93.[12]

The court of appeals concluded that applying the damages provisions of Section 102 to conduct that occurred before the effective date of the Act would be unfair to employers who did not foresee that they might be liable for more than backpay. See 92-757 Pet. App. A10 (compensatory damages represent "a seachange in employer liability"); see also *Luddington*, 966 F.2d at 228-229. But Section 102 applies only to intentional acts of discrimination that were illegal under Title VII at the time they were committed. "[T]here is no such thing as a vested right to do wrong." *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160, 175 (1865). Consequently, it is not unfair to require employers to compensate the victims of illegal discrimination for injury caused by the employer's illegal conduct. Indeed, *Bradley* authorized basically comparable relief (an award of previously unauthorized attorney's fees, which would not have been incurred but for the wrongdoer's unlawful conduct).[13]

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[12] In holding that backpay awards are taxable as ordinary income in *United States* v. *Burke*, 112 S. Ct. 1867, 1874 & n.12 (1992), the Court noted that the damages provisions of the Civil Rights Act of 1991 reflect a "marked change in [Congress's] conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit." That statement does not address the question whether Section 102 should be considered "substantive" in the context of the Act's application to pending claims for make-whole relief.

[13] We think it is a much different and more difficult question whether the punitive damages provisions of Section 102 should be applied to cases involving conduct that occurred prior to the effective date of the Act. By definition, punitive damages do not merely compensate the victim for his or her injury. And we are not aware of any statute in which Congress has explicitly applied a provision allowing punitive damages to conduct that occurred before the statute was enacted—a consideration relevant to the

Concern for employers must be balanced against concern for the victims of intentional discrimination. If the employer does not bear the cost of intentional discrimination, that cost will be borne by the victim. In striking that balance, it is important to bear in mind that Title VII cases are not "mere private cases between individuals," *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110, but instead are concerned with unlawful discrimination, one of the greatest of our national concerns. In enacting the compensatory damages provisions of Section 102, Congress determined that the employer, rather than the victim, should bear the full cost of the discrimination. 137 Cong. Rec. S15,338 (daily ed. Oct. 29, 1991) (statement of Sen. DeConcini) (Congress intended to "place the injured party, inasmuch as possible, in the same position he or she would have been in the absence of the discriminatory act against the person"). There is nothing unjust about holding the wrongdoer responsible for injuries caused by conduct that has been illegal for almost 30 years. Accordingly, *Landgraf* should be remanded for a hearing on appropriate damages under Section 102.[14]

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question of presumed legislative intent. We note, however, that any potential unfairness to employers is mitigated by Section 102 (b) (1), which allows the jury to award punitive damages only if the plaintiff demonstrates that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The courts below concluded that Section 102 as a whole should not be applied to pre-enactment conduct, and therefore did not consider the arguments for drawing a distinction between compensatory and punitive damages. We believe it would be appropriate for the Court to follow its usual course and not address a question that was not considered or decided by the courts below.

[14] In cases in which the district court entered an error-free judgment for the defendant prior to the Act's effective date, we do not believe plaintiffs are entitled to retrial merely on the ground that a jury might reach a different result as to liability. *Cf. Kremer*

2. *Section 101 Applies to Petitioners' Claims in* Rivers

In *Rivers*, the conduct at issue occurred before the effective date of the Act and before the Court decided *Patterson*. While the case was pending in the district court, this Court decided *Patterson*. The district court dismissed the Section 1981 discriminatory discharge claim in light of *Patterson*. While the case was pending on appeal, Congress passed the new Act.

There is no doubt that Section 101 expands the scope of Section 1981 to cover conduct that did not violate Section 1981 as construed by this Court in *Patterson*. In most cases, however—including this one—Section 101 applies to conduct that was already illegal under Title

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v. *Chemical Construction Co.*, 456 U.S. 461, 481 (1982) (prior determination against Title VII plaintiff in state proceedings bars Title VII claim, by collateral estoppel, unless there is reason to doubt quality, extensiveness, or fairness of procedures followed in prior litigation). If the district court has entered judgment for the plaintiff on the liability issue, however, we believe cases on appeal should be remanded for a determination of damages. Because Section 102 provides for jury trials in cases in which plaintiffs seek compensatory and punitive damages, it is arguable that Seventh Amendment considerations require that defendants in such a situation have an opportunity to relitigate the liability issue before a jury. *Cf. Lytle* v. *Household Manufacturing, Inc.*, 494 U.S. 545 (1990) (Seventh Amendment precludes according collateral-estoppel effect to district court's determination of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims). In our view, the considerations set out above warrant application of Sections 101 and 102 to pending cases, even if turns out that, in limited circumstances, the entire case must be retried. In the alternative, however, the Court might hold that the new provisions should be applied to pending cases unless their application would require a retrial. See *Mojica* v. *Gannett Co.*, Nos. 91-3921 & 92-1104 (7th Cir. Mar. 4, 1993) (Cummings, J., dissenting from order granting rehearing en banc) (suggesting that the Act should be applied to pending cases that had not yet been tried); *Mozee*, 963 F.2d at 937 (same).

VII long before November 21, 1991.[15] *Fray*, 960 F.2d at 1378 (conduct covered by Section 101 "was clearly actionable under Title VII"); *Mozee*, 963 F.2d at 941 (Cudahy, J., dissenting) ("Section 101 merely provides new remedies for old wrongs."); see also *O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 171 (2d Cir. 1984), cert. denied, 469 U.S. 1212 (1985) (ERISA amendment awarding interest and attorney's fees applies to pending case where employer was liable under a different provision before the amendment). Consequently, "application of § 101 to [a] pending case would neither alter the rights and expectations of the parties nor disturb previously vested rights." *Fray*, 960 F.2d at 1378.[16]

In addition, Congress viewed Section 101 as restoring a remedy for Section 1981 violations that was eliminated by *Patterson*, which denied remedies to victims of discrimination in hundreds of cases that were pending at the time of the decision. See 136 Cong. Rec. S9336 (daily ed. July 10, 1990) (statement of Sen. Hatch); 137 Cong.

[15] In the present case, the district court ruled that the employer was not liable under Title VII. The court of appeals nonetheless properly ruled that the district court's holding under Title VII did not have a collateral estoppel effect on the Section 1981 claims. See *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545 (1990). Because the Sixth Circuit has remanded the other Section 1981 issue to be tried before a jury, application of the Act would not require the district court to conduct additional proceedings. See 92-938 Pet. App. 9a-10a.

[16] Not all conduct that is proscribed by Section 101 was also unlawful under Title VII or another civil rights law. For example, Title VII does not apply to employers with fewer than 15 employees. 42 U.S.C. 2000e(b). Moreover, Section 1981 is not limited to the employment context. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Under the view we advance, Section 101 would not apply to conduct that was not unlawful at the time it occurred. In addition, punitive damages were not available under Title VII prior to the Act. If the Court were to conclude that punitive damages should not be available under Section 102 to plaintiffs injured by pre-Act conduct, see note 13, *supra*, we believe that the same result would be appropriate under Section 101.

Rec. S15,383 (daily ed. Oct. 29, 1991) (statement of Sen. Jeffords); 136 Cong. Rec. S9321 (daily ed. July 10, 1990) (statement of Sen. Kennedy). As Senator Leahy described the result of *Patterson* (137 Cong. Rec. S15,489 (daily ed. Oct. 30, 1991)):

> If, for example, an employer intentionally harasses or otherwise persecutes an employee solely on account of race, the current civil rights laws cannot require the employer to compensate that person fully for the damage he has caused, no matter how great or how real. Nor can the employer be forced to pay punitive damages no matter how outrageous his conduct has been. By overturning the Supreme Court's decision in Patterson versus McLean Credit Union, the Civil Rights Act of 1991 would remedy this injustice.

See also 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Simpson) ("almost everyone agree[d]" that *Patterson* needed to be "overturn[ed]"); 137 Cong. Rec. S15,383 (Oct. 29, 1991) (statement of Sen. Jeffords) ("[e]very civil rights proposal made over the past year-and-a-half has included a Patterson reversal as one of its terms"); 137 Cong. Rec. S15,285 (Oct. 28, 1991) (statement of Sen. Seymour) (bill restoring remedies under Section 1981 was "noncontroversial"). Where Congress unequivocally finds that a recent Supreme Court decision unfairly denies a remedy for discrimination, it is proper for the courts to infer that Congress intended for the curative legislation to apply to pending cases, and to deny the contrary decision any further effect. Cf. *Lussier* v. *Dugger*, 904 F.2d 661 (11th Cir. 1990) (Civil Rights Restoration Act of 1987 reversing *Grove City* decision applied to pending case); *Ayers* v. *Allain*, 893 F.2d 732, 754-755 & n.116 (5th Cir.), vacated on other grounds, 914 F.2d 676 (5th Cir. 1990) (en banc), vacated *sub nom. United States* v. *Fordice*, 112 S. Ct. 2727 (1992) (same). But see *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir.

1990), cert. denied, 111 S. Ct. 799 (1991). As the Ninth Circuit observed in *Reynolds*, it "would seriously undermine Congress' stated intent" if the Court were to hold that "the decisions [Congress] repudiated would live on in the federal courts for * * * years." 985 F.2d at 475-476. See also *Mojica*, slip op. 12 (Cummings, J., dissenting from order granting rehearing en banc) ("It would be sophistry to suggest that *Patterson* should have lingering effect in new civil rights cases for years to come, when Congress has so emphatically expressed its disapproval of that decision.").

CONCLUSION

The judgments of the courts of appeals should be reversed, and the cases remanded for further proceedings.

Respectfully submitted.

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OCTOBER TERM, 1992

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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v.

ROADWAY EXPRESS, INC.,

Respondent.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE AMERICAN JEWISH COMMITTEE, AND THE ANTI-DEFAMATION LEAGUE AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICI[1]

The National Association for the Advancement of Colored People ("NAACP") is a nonprofit membership organization with a substantial number of members nationwide. The NAACP has chartered affiliates in each of the fifty states of the United States. Since its founding in 1909, one of the principal goals of the NAACP has been to insure that minority group citizens have as fair and equal employment opportunities as are enjoyed by white citizens. The cases currently before this Court are of particular importance to the members and supporters of the NAACP, in view of the large number of claims that would be completely precluded by the affirmance of the decisions below. For example, the NAACP initially funded and has supported the case of *Howard R.L. Cook et al. v. Billington*, No. 82-0400 (D.D.C. February 10, 1982), which challenges conduct dating to 1974 but has not yet had a final judgment in the District Court. The outcome of the cases before this Court will have a substantial impact upon *Cook* and hundreds of other cases alleging racial discrimination.

The American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-four million members are employed, and most of them are protected by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Em-

[1] The petitioners and respondents in both cases have consented to the filing of this Brief, and copies of the parties' consent letters have been filed with the Clerk.

ployment Act, 29 U.S.C. § 621 *et seq.* One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. In pursuit of this objective, AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal Courts of Appeals.

The American Jewish Committee ("AJC") is a national membership organization founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure only if they are equally secure for all Americans, irrespective of race, faith, national origin or gender. AJC, therefore, has been actively involved in the civil rights cause since its inception, and strongly supported enactment of the Civil Rights Act of 1991. AJC also urged the United States Equal Employment Opportunity Commission to rescind its Policy Guidance denying the application of the damages provisions of the Act to pending cases and pre-Act conduct. AJC believes that both the language of the Civil Rights Act of 1991 and the legislative intent behind that statute mandate retroactive application to pre-Act conduct and pending cases. AJC maintains that retroactive application is the only way to insure one of the main purposes of the Civil Rights Act of 1991: to secure new remedies for victims of discrimination.

Since 1913, the nonprofit Anti-Defamation League ("ADL") has pursued the objective set out in its Charter "to secure justice and fair treatment to all citizens alike." In order to further this objective, ADL has fought steadfastly in Congress, courts, and the public arena to remove barriers which have prevented individuals from enjoying fully the rights protected

by federal civil rights laws. Most recently, ADL supported the enactment of the Civil Rights Act of 1991 as an effort to redress the inequities stemming from several Supreme Court decisions. ADL believes the application of the Act to pre-Act conduct being challenged in the pending cases is consistent with the intent of Congress and is crucial to protect the interests of victims of racial, sexual, national origin, or religious discrimination.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), applies to all cases alleging discrimination in employment that were pending when the Act was passed. The statutory language and the overall scheme of the 1991 Act demonstrate that Congress intended for the Act to apply to cases pending at the time of its enactment. Moreover, retroactive application is entirely in keeping with the manner Congress and this Court have treated prior civil rights statutes. Both the Civil Rights Act of 1960 and the 1972 Amendments to the Civil Rights Act of 1964 were applied by this Court to cases pending at the time of their enactment. In light of the procedural and remedial changes implemented by the Civil Rights Act of 1991, it, too, should be applied to pending cases.

If this Court were to find that the Act does not apply to all such pending cases, enormous resources in terms of the time, money, and energy of courts, attorneys, and parties would be wasted on the interpretation of the numerous cases which were repudiated by the Act. Moreover, if the Act is not applied retroactively, thousands of individual victims of discrimination will be left without a remedy or with only

partial remedies for the wrongs that they have suffered.

ARGUMENT

Title I of the Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), (the "1991 Act" or "Act") applies to all cases alleging discrimination in employment that were pending when the Act was passed. The 1991 Act creates no new substantive rights, nor does it change the substantive law of civil rights. Discrimination on the basis of race, color, religion, sex, or national origin has long been unlawful, and the 1991 Act does not alter that essential principle of American national policy. Rather, the Act provides victims of unlawful discrimination with additional remedies for the protection of their pre-existing right to be free from that discrimination.

As remedial legislation, therefore, the Civil Rights Act of 1991 applies to cases pending at the time the law was passed. Moreover, the application of the 1991 Act to pending cases is consistent with and supported by the plain language of the Act, the purposes of the Act, and the nation's long-standing policy to eradicate discrimination.

If the Act is not applied to cases pending at the time of its enactment, there will be dramatic consequences to individual victims of discrimination and to the justice system as a whole. Thousands of individuals who brought claims in good faith, based on generally accepted interpretations of laws which existed at the time their lawsuits commenced, will have those

claims rejected by courts based on subsequent statutory interpretations that have been unambiguously rejected by Congress. Thousands of individuals will find themselves without any remedy, even if a court determines that they were the victims of unlawful discrimination. Thousands of government employees will continue to be second-class citizens long after Congress has determined that their remedies for discrimination should more closely approximate those of private-sector employees. Courts at all levels will struggle with civil rights cases that must proceed on two incompatible tracks—one recognizing and proceeding in accordance with the Congressionally-mandated track of post-1991 Act cases, and the other proceeding along an out-dated and Congressionally-repudiated track of pre-1991 Act cases.[2] In order to avoid these immeasurable harms, this Court must find the Civil Rights Act of 1991 to apply to cases pending at the time of the statute's enactment.

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[2] Some cases would be fated to continue along *both* tracks. For example, in the *Cook* litigation sponsored by amicus NAACP, one phase of the case has proceeded to an interlocutory finding of liability and an interlocutory award of damages, a second phase has proceeded to an interlocutory finding of liability, and a third phase has not yet proceeded to a finding of liability or damages. Nevertheless, these three phases will likely be appealed simultaneously, presumably forcing the Court to apply pre-1991 Act law to the first phase, post-1991 Act law to the third phase, and an undetermined law to the middle phase. For example, the burdens of proof set forth in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), have already been applied to the first two phases; however, they may not apply to the third phase, despite the fact that all three phases involve many of the same individual victims of discrimination. Such confusion will ultimately result in harm to parties and to courts.

I. If This Court Fails to Find the Act Retroactive, Vast Judicial Resources Will be Wasted to Preserve Disfavored Law.

There can be no dispute that litigation consumes enormous resources in terms of time, money, and the energy of courts, attorneys, and parties. This expense is particularly great in civil rights actions, which are notoriously long and complex, frequently spanning up to a decade and encompassing classes that number up to thousands of individuals. If this Court fails to find that the 1991 Act applies to cases pending at the time of its enactment, it will in effect mandate that decades of court time, decades of parties' time, decades of attorneys' time, and millions of dollars be spent dissecting and refining a body of law—the eight cases which were reversed by Congress in the Act—which is no longer valid. Congress simply cannot be presumed to have intended a waste of judicial and other resources of this magnitude.

In the eight cases corrected by the Act, the discriminatory conduct at issue was, on average, nearly 8.7 years old by the time the cases reached the Court.[3]

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[3] *See EEOC v. Arabian American Oil Co.*, ___ U.S. ___, 111 S. Ct. 1227 (1991) (plaintiff dismissed in 1974); *West Virginia University Hosp., Inc. v. Casey*, ___ U.S. ___, 113 L. Ed. 2d 68 (1991) (disputed practice occurred in January 1986); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (plaintiff fired in 1982); *Martin v. Wilks*, 490 U.S. 755 *reh'g denied*, 492 U.S. 932 (1989) (consent decree entered in 1981; suit filed in 1982); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (case filed in 1974); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plaintiff denied partnership in 1983); *Lorance v. AT&T Technologies Inc.*, 490 U.S. 900 (1989) (seniority system adopted in 1979; plaintiff laid off in 1982); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (Title VII complaints filed in 1976 and 1977).

Four of those cases were carried into their second decade when they were remanded for further proceedings.

If the Act applies only to conduct occurring on or after its effective date, November 21, 1991, then courts will be forced to construe the nuances of cases like *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989), for many years, long after those cases have been repudiated by Congress. Victims of discrimination will continue to be denied the protections they were promised through the Act, and the central purpose of the Act will be frustrated. Indeed, for all practical purposes, if the Civil Rights Act of 1991 is not applied to pending cases, that Act will be transformed into the "Civil Rights Act of 2000" because of the time it will take for pending cases to be resolved under the antiquated pre-1991 rules. The language that the "Act shall take effect upon enactment," Civil Rights Act of 1991,§ 402(a), would thereby be judicially rendered meaningless for thousands of aggrieved individuals. Nowhere in the volumes of legislative history for the 1991 Act did Congress evince an intent that the decisions expressly repudiated by the Act should live on in the federal courts until the next century.

II. If the Act is not Applied to Cases Pending at the Time of its Enactment, Hundreds, if not Thousands, of Individuals Will be Left Without A Remedy for Proven Discrimination.

The very real need for the Act to apply to cases pending at the time of its enactment can be seen in

a concrete examination of Section 101.[4] The principal purpose of that section is to restore the protections and remedies against intentional racial and ethnic discrimination that were lost by many Americans as a result of this Court's narrow interpretation of 42 U.S.C. § 1981 in its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[5] In *Patterson*, this Court, while expressly recognizing the United States' long-standing national policy and deep commitment to the eradication of discrimination, concluded that Section 1981 did not encompass claims for discrimination in employment when those claims arose from conduct after the formation of the employer-employee relationship. *Patterson*, 491 U.S. at 171. This Court concluded that the petitioner's claim could be brought only under Title VII, 42 U.S.C. § 2000e, and because it was not, petitioner, like many other claimants under Section 1981, was left without a remedy.

Congress' reaction to the Court's interpretation of Section 1981 was swift and unanimous.[6] Both Houses

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[4] Section 101 of the Act contains no special clause discussing whether it is to be applied to cases pending at the time of the Act's enactment. Rather, by its plain language, it must be construed under the Act's general applicability clause. *See, infra*, pp. 15-19.

[5] While both of the instant cases address issues concerning discrimination in employment, a thorough review of the jurisprudence of the 1991 Act must include an examination of other factors, such as Section 101's correction of *Patterson* and that case's interpretation of the laws concerning the making, execution, and termination of contracts. This necessity is underscored by the panoply of cases which continue to try to extend *Patterson* to non-employment settings. *See, e.g., Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992).

[6] *See, e.g.*, 137 Cong. Rec. S15383 (Daily ed. Oct. 28, 1991) (Sen.

of Congress and President Bush sought to correct the Court's interpretation because of the large number of victims left without a remedy in light of the *Patterson* ruling. During the debates preceding the enactment of the 1991 Act, Congress was made aware that there were hundreds of cases—involving thousands of victims of intentional discrimination—that were being dismissed pursuant to *Patterson*. The legislative history of the Act is replete with references to Congress' desire to act in the face of the many cases alleging intentional discrimination that were being dismissed. *See* 136 Cong. Rec. S9321 (Daily ed. July 10, 1990) (Statement of Sen. Kennedy) ("Already, the Patterson decision has caused the dismissal of more than 200 claims of race discrimination in the last year. It must be overruled by this Congress."); 136 Cong. Rec. S9336 (Daily ed. July 10, 1990) (Statement of Senator Hatch). The Bush Administration decided to support correcting *Patterson* based largely on the studies that had been submitted to Congress demonstrating the sheer volume of cases that had been dismissed.[7]

Even when President Bush vetoed the Civil Rights Act of 1990, he stated his support for correcting the *Patterson* decision. *See* 136 Cong. Rec. S16562 (Daily ed. Oct. 24, 1990). With the enactment of Section 101 of the 1991 Act, Congress completed its task of restoring remedies to victims of discrimination, who, like

Jeffords); 137 Cong. Rec. S15285 (Daily ed. Oct. 28, 1991) (Sen. Seymour); 137 Cong. Rec. S15483 (Daily ed. Oct. 30, 1991) (Danforth Interpretive Memorandum); 137 Cong. Rec. S15489 (Daily ed. Oct. 30, 1991) (Statement of Sen. Leahy).

[7] *See* Statement of Donald B. Ayer, Deputy Attorney General, *reprinted in* Hearings on H.R. 4000, The Civil Rights Act of 1990, Volume 1, page 366 (Feb. 1990).

the petitioner in *Patterson*, otherwise were left with an empty right purporting to protect them from unlawful discrimination.

If this Court holds, however, that the Act does not apply to cases pending at the time of its enactment, Congress' action is largely frustrated. Mary Ann Vance is a representative of the many victims of unlawful discrimination left without a remedy after *Patterson*, if the 1991 Act is not applied to pending cases. In *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989), two different all-white juries, on two separate occasions, returned substantial verdicts for Vance, a black employee of Southern Bell. The first jury awarded Vance more than 3.5 million dollars in compensatory and punitive damages. On appeal, the Eleventh Circuit found sufficient evidence to support the determination of liability, but concluded that the damages were excessive.

Shortly after remand from the first appeal, this Court decided *Patterson*; however, the district court decided the case on remand under pre-*Patterson* law, and the second jury awarded Vance more than one million dollars. On appeal, the Eleventh Circuit applied *Patterson* retroactively to vacate the verdict, even though Congress had already enacted the 1991 Act repudiating *Patterson*. Thus, Vance, who demonstrably was the victim of unlawful discrimination in her employment, was deprived of her economic remedy calculated by a jury because of the Eleventh Circuit's application of *Patterson*, after *Patterson* was overruled by Congress.[8]

[8] Title VII is not a realistic remedy for those individuals who sought redress for employment discrimination under Section 1981

Similarly, *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992), illustrates the pitfalls of failing to apply the 1991 Act to pending cases. In that case, Alan Gersman and his company, Computer Security International ("CSI") brought suit under Section 1981 against Group Health Association ("GHA"), alleging that GHA had wrongfully terminated a contract with CSI because CSI's president was Jewish. The United States District Court for the District of Columbia held that *Patterson* barred a Section 1981 claim for discrimination in the performance of a contract, because that case limited the application of Section 1981 to the formation of a contract. The Court of Appeals affirmed that holding. Upon this Court's granting *certiorari*, *Gersman v. Group Health Ass'n*, ___ U.S. ___, 112 S. Ct. 960 (1992), the case was vacated and remanded to the Court of Appeals, in light of the Civil Rights Act of 1991.

On remand, the District of Columbia Court of Appeals stood by its decision that *Patterson* controlled, and that the Act could not be applied to *Gersman*, a case pending at the time that the statute was enacted. Thus, Gersman and CSI remained the uncompensated victims of discrimination, based on a case—*Patterson*—which Congress repudiated months before the final court decision was rendered. Unless the 1991 Act is retroactively applied to pending cases, Vance, Gersman, and many other minority Americans will have no remedy for the undisputable wrongs perpetrated upon them.

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because, in reliance on Section 1981 many did not file claims with the Equal Employment Opportunity Commission during the required time period. Therefore, those individuals would be left without any remedy at all if this Court concludes that Section 101 of the Act does not apply to pending cases.

III. If the Act is not Applied Retroactively, Federal Employees Will be Left Without a Real Remedy for the Discrimination They Have Suffered.

Another example of the crucial need for application of the Act to cases pending at the time of its enactment can be seen with regard to Section 102 of the 1991 Act. While that section does not create new substantive rights for federal employees, it does create new procedures and remedies for those workers.[9] Section 102 provides public-sector employees with compensatory damages, pre-judgment interest, and the right to a jury trial. It is unconscionable that these remedies—which merely serve to bring federal employees more in line with their private-sector counterparts—should not apply to the thousands of federal workers whose claims are pending.

In fact, this Court recently reiterated its long-standing position concerning a court's ability to award rem-

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[9] African-Americans have long represented a greater percentage of federal executive branch employment than private employment. African-Americans represent 16.6% of executive branch government employees, while they represent merely 12.1% of the national population. 1992 *Statistical Abstract of the United States*, 112th ed. This has generally been thought to be due to the desire for enhanced security in employment. *See, e.g., Bowman, Public Policy: "We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 82 (1991) (discussing African-Americans and "government jobs which are valued for their security.") Yet, the federal government has been rife with discrimination, and there are literally dozens of cases in which the federal government has been found to discriminate. *See, e.g., Turner v. Barr*, 806 F. Supp. 1025 (D.D.C. 1992), *reh'g denied* 811 F. Supp. 1 (1993); *Timus v. Secretary of Labor*, 782 F. Supp. 122 (D.D.C. 1991); *Coleman-Santucci v. Secretary, U.S. Dept. of Health and Human Servs.*, 754 F. Supp. 209 (D.D.C. 1991).

edies, including damages, when a statute has been violated. Last term, this Court held:

> [W]here legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Franklin v. Gwinnett County Pub. Schools, ___ U.S. ___, 112 S. Ct. 1028, 1033 (1992), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). Relying on this long-lived standard, which this Court traced back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court concluded:

> The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

Franklin, 112 S. Ct. at 1035.

The Civil Rights Act of 1991 presents precisely the sort of legislation contemplated by *Franklin*. The Act provides a "general right to sue" for violations of legal rights. In fact, the 1991 Act provides "clear direction" that a Court *should* award appropriate relief to civil rights plaintiffs. Thus, under this Court's own recently reiterated precedent, the remedial provisions of the Civil Rights Act of 1991 should be applied to cases pending at the time of enactment.[10]

[10] Lest employers argue that retroactive application 0f the Act would submit them to undue hardship, Congress reflected its would submit them to undue hardship, Congress reflected its concern for costs to discriminating employers by capping the damages that are available under Section 102 of the Act. This cap shows a careful and deliberate effort to balance the equities between full vindication of an employee's existing rights and the concerns of employers. The legislative debates are replete with references regarding the inadequacy of the remedial scheme of Title VII as it previously existed, and no one suggested that only future victims of discrimination deserve adequate remedies. *See* 137 Cong. Rec. S15338 (Daily ed. Oct 29, 1991) (Sen. DeConcini); 137 Cong. Rec. S15383 (Daily ed. Oct. 29, 1991) (Sen. Jeffords); 137 Cong. Rec. S15392 (Daily ed. Oct. 29, 1991) (Sen. Daschle); 137 Cong. Rec. S15482 (Daily ed. Oct. 30, 1991) (Sen. Gore).

IV. The Statutory Language and Scheme of the 1991 Act Demonstrate that Congress Intended that the Act be Applied Retroactively.

The appropriateness of applying the 1991 Act to pending cases is confirmed by the plain language of the Act. Section 402, entitled "Effective Date," unambiguously provides in subsection (a):

> Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

Civil Rights Act of 1991, § 402(a). This plain instruction to apply the Act immediately upon enactment to pending matters as well as future conduct is confirmed by the over-arching statutory scheme.

Consistent with the command of Section 402(a), certain provisions of the Act are expressly not retroactive. Section 109, which concerns the protection of American citizens employed abroad by American companies, expressly provides:

> [T]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

Section 109(c). This subsection would be mere surplus verbiage if the plain language of Section 402(a) of the Act is not given effect.

Similarly, Section 402(b) excludes from the entire Act certain disparate impact cases commenced and decided before the Act was enacted, providing:

> Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Civil Rights Act of 1991, § 402(b). Thus, section 402(b) exempts from the retroactive application of the Act a narrowly defined class of cases. If the Act were not intended generally to have retroactive application, Section 402(b), like Section 109(c), would be wholly superfluous.

Any argument that the 1991 Act applies to prospective conduct or cases only necessarily negates the plain language and effect of Sections 109(c), 402(a) and 402(b), and disregards the fundamental principle of statutory construction forbidding interpretations that would render any provisions of an act a nullity. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (J. Scalia) ("the cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant"). The only interpretation of the 1991 Act that gives effect to *all* the words and clauses enacted by Congress, is that the Act is to be applied to all pending cases except where the Act expressly provides otherwise. Significantly, this interpretation of the Act as a whole also gives effect to the plain language of Section 402(a).

In contrast to Congress' express exceptions from immediate application, several provisions of the Act clearly require retroactive application of the Act. Section 101's correction of *Patterson* and Section 102's closing of several remedial loopholes for federal employees both indicate by their plain language that they apply to pending cases. Construing either of these sections to apply only to cases after the Act's enactment would rule out thousands of cases, permitting the perpetuation of unlawful discrimination. Absent a special retroactivity provision like Section 109(c) or Section 402(b), Section 101 and 102 can only function properly under the Act's general retroactivity provision, Section 402(a).

Section 108 of the Act responds to *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989), by limiting challenges to litigated and consent judgments and orders resolving employment discrimination claims where the challenging party had sufficient notice and an opportunity to be heard, "prior to the entry of the judgment or order." This section clearly is worded so as to protect existing as well as future judgments and orders where the statutory conditions are met—obviously protecting conduct that occurred prior to the enactment of the Act. Construing the Act as prospective would leave existing consent decrees and orders open to challenge in perpetuity, keeping *Martin v. Wilks* alive. Like Sections 101 and 102, Section 108 does not contain any special retroactivity provisions, but can only function properly under the general retroactivity of the statute pursuant to Section 402(a).

Section 112 restores the right to challenge existing discriminatory seniority systems adopted long ago, as long as the charging party becomes subject to the system or is affected by it within the period of limitations. Again, unless the statute applies to pending cases and conduct, Section 112 would be rendered largely meaningless and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which limited such challenges, would live on. Like Sections 101, 102, and 108, Section 112 contains no special rule providing for immediate application but presumes through Section 402(a) application to conduct occurring before the date of enactment.

Section 113 of the Act allows the award of expert fees in Title VII actions and "in any action" or proceeding under 42 U.S.C. § 1981 or the new Section 1981A. It would be extraordinary to read this broadly-worded provision as not allowing future awards of expert fees in cases filed before November 21, 1991, or not allowing awards for the part of the expert's services that were performed before that date. As this Court recognized in *Ex Parte Collett*, 337 U.S. 55, 58 (1949), the reach of language such as "in any action" is unmistakably long. Thus, as with the other provisions noted above, this section assumes a general rule of retroactivity under Section 402(a).

Section 114 of the Act governs cases against federal agencies under Section 717 of the Civil Rights act of 1964, as amended, 42 U.S.C. § 2000e-16, and overrules *Library of Congress v. Shaw,* 478 U.S. 310 (1986), by providing that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Where the central purpose of Congress is to provide compensation for

delay in payment, it would be an unusual construction that a future award of interest cannot compensate for delay occurring before November 21, 1991. Section 114 contains no special provision requiring retroactive application to pending cases and conduct; it too functions under the general rule of retroactivity in Section 402(a).

Finally, Section 115 of the Act changes the statute of limitations period for claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"), to ninety days from receipt of the Equal Employment Opportunity Commission's ("EEOC") termination notice. The undisputed purpose of this amendment was to "avoid[] the problems created by current law . . . ." 137 Cong. Rec. H9548 (Daily ed. Nov. 7, 1991). As with the procedural amendment of Section 113, it would be incongruous to interpret Section 115 to perpetuate the problems that had been caused by the ADEA's former statute of limitations. Section 115, like the other sections containing no explicit retroactive provision must be deemed to apply to cases pending at the time of its enactment.

Thus, the statutory scheme of the Act reinforces the clear congressional mandate in Section 402(a) that provides a general rule of retroactive application to pending cases, unless otherwise specifically provided by the Act. No provisions are written in a matter which assumes a contrary reading of Section 402(a). Immediate application offers the only interpretation that would provide coherence and meaning to the statute as a whole.

V. This Court has Held Other Civil Rights Statutes Applicable to Pending Cases.

The application of the Civil Rights Act of 1991 to cases pending at the time of its enactment follows a long course of tradition with regard to the retroactivity of civil rights statutes.

A. The 1960 Civil Rights Act Was Applied to Pending Cases.

Significantly, more than three decades ago, this Court held the Civil Rights Act of 1960 applicable to pending cases. In *United States v. Alabama*, 362 U.S. 602 (1960), an action had been brought against the State of Alabama for alleged racially discriminatory conduct by the Board of Registrars of Macon County, Alabama. The action was dismissed by the District Court on the grounds that, *inter alia*, the state was not a "person" subject to suit under the Civil Rights Act of 1957. The District Court's ruling was affirmed by the Court of Appeals. *United States v. Alabama*, 267 F.2d 808 (5th Cir. 1959). By the time the case was heard by this Court, however, the Civil Rights Act of 1960—which expressly authorized such actions—had been passed by Congress. Four days after the matter was heard by this Court, the 1960 Act was signed by the President.[11] This Court, ten days later, vacated the judgments of the District Court and the Court of Appeals and remanded the action, explaining:

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[11] *United States v. Alabama* was heard by this Court on May 2, 1960. The Civil Rights Act of 1960 was signed by the President on May 6, 1960. This Court decided *United States v. Alabama* on May 16, 1960. 362 U.S. at 602, 604.

> Under familiar principles, *the case must be decided on the basis of law now controlling*, and the provisions [of the Civil Rights Act of 1960 authorizing such actions] are applicable to this litigation. . . . [B]y virtue of the provisions of that section the District Court has jurisdiction to entertain this action against the State.

United States v. Alabama, 362 U.S. at 604 (emphasis added) (citations omitted). The same rule should control the current incarnation of civil rights law—the Civil Rights Act of 1991 should apply to cases pending at the time of its enactment.

B. The 1972 Amendments to the Civil Rights Act Were Applied to Pending Cases.

Following this Court's lead in *United States v. Alabama*, numerous courts have held remedial civil rights statutes to be retroactive because of their procedural nature. The issue again arose with regard to the 1972 Amendments to the Civil Rights Act of 1964, upon the passage of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, (the "1972 Amendments"). Title VII of the Civil Rights Act of 1964 forbade employment discrimination on the basis of race, color, religion, sex, or national origin; however, until enactment of the 1972 Amendments, Title VII did not provide federal employees with access to the federal courts to protect those rights.[12]

The issue of whether the 1972 Amendments applied to actions pending administratively on the effective

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[12] The 1972 amendments expressly provided federal employees with a remedy in federal district court upon exhaustion of their administrative remedies. *See* 42 U.S.C. § 2000e-16(c) (1992).

date of the act was addressed by the Court of Appeals for the Fourth Circuit in *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974). Holding that the 1972 Amendments applied to cases pending at the time of enactment, the court explained:

> The legislative history establishes that the 1972 Act did not create a new substantive right for federal employees. The constitution, statutes, and executive orders previously granted them the right to work without racial discrimination. Section 717(c) simply created a new remedy for the enforcement of this existing right.
>
> * * * *
>
> *Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment.* Of course, retrospective application is not allowed when it will work a manifest injustice by destroying a vested right. But this exception plays no role here because the government has no vested right to discriminate against its employees on the basis of race.

497 F.2d at 705-706 (emphasis added) (citations omitted).

Other circuits soon adopted the holding and rationale of *Koger*. In *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974), the District of Columbia Circuit expressly adopted the reasoning of *Koger* and held that the statute was remedial and applied retroactively to pending cases. In *Sperling v. United States*, 515 F.2d 465 (3d Cir. 1975), the Third Circuit expressly agreed with the reasoning of *Koger* and held that the amendments were "a classic example of a procedural or remedial statute applicable to cases pending at the time of enactment." 515 F.2d at 473 (footnote omitted). In *Adams v. Brinegar*, 521 F.2d 129, 130 (7th Cir. 1975), the Seventh Circuit cited *Koger* and concluded that "Congress, in enacting the 1972 Amendments, was merely providing an additional remedy to enforce a preexisting right."

In *Brown v. General Servs. Admin.*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976), the Second Circuit analyzed arguments in favor of the retroactive application of the 1972 Amendments, and the arguments against. The Second Circuit concluded: "So far as the statutory language and relevant legislative history are concerned, retroactive application . . . would appear to be appropriate . . . [and] [i]n view of the policy of the federal government against discrimination in federal employment . . . such retroactive application of the statute appears sound." 507 F.2d at 1306. On appeal, this Court expressly recognized the Second Circuit's holding that the 1972 Amendments applied retroactively to pending cases and noted: "The parties have apparently acquiesced in this holding by the Court of Appeals, and we have no occasion to disturb it." *Brown v. General Servs. Admin.*, 425 U.S. 820, 824 n.4.

In fact, the only circuit to hold that the 1972 Amendments were not applicable to pending actions was the Sixth Circuit. In *Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974), the Sixth Circuit held that the provisions of the 1972 Amendments which were silent on the issue of retroactivity must be held to

be prospective only.[13] The Sixth Circuit's ruling however, was vacated by this Court with express reference to footnote four in *Brown v. General Servs. Admin.*, ordering:

> [Petition for writ of] [c]ertiorari granted, judgment vacated and case remanded to the Court of Appeals for the Sixth Circuit for further consideration in light of *Brown v. General Services Administration*, 425 U.S. 820, 824 n.4 (1976).

Place v. Weinberger, 426 U.S. 932 (1976). Thus, this Court once again recognized the special application of civil rights legislation to cases pending at the time of its enactment.

VI. Legislation Providing Procedural and Remedial Changes Traditionally Applies to Pending Cases.

A. Procedural and Remedial Statutes are Traditionally Held to Apply to Cases Pending at the Time of Their Enactment.

Even beyond the area of civil rights legislation, this Court has repeatedly held that statutes enacting procedural and remedial measures apply to cases pending

---

[13] Even applying the Sixth Circuit's analysis of the 1972 Amendments to the 1991 Act, the 1991 Act should be held retroactive. In *Place v. Weinberger*, the Sixth Circuit concluded that Congress' express provision in the act for Sections 11 and 14 to be retroactive to pending claims coupled with Congress' silence on the other sections indicated that those other sections should have prospective application only. 497 F.2d at 414. In the 1991 Act, by contrast, Congress expressly provided that Sections 109(c) and 402(b) will have only *pro*spective application. Thus, even by the Sixth Circuit's logic in *Place*, Congress' silence as to the remaining sections of the 1991 Act indicates that such sections should have retroactive application.

at the time of enactment. Over one and a half centuries ago, this Court wrote:

> [C]onsidering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided by this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.

Sampeyreac v. United States, 32 U.S. 222, 239 (1833). This conclusion is based, at least in part, on the theory that "[n]o one has a vested right in any given mode of procedure . . ." *Crane v. Hahlo*, 258 U.S. 142, 147 (1922).

This reasoning has been followed through the decades. In *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464-65 (1921), this Court held that injunctive relief, made available because of the enactment of Section 1 of the Clayton Act, applied to cases pending at the time the law was enacted. In *Ex Parte Collett*, 337 U.S. 55, 71 (1949), this Court held that the previously unavailable doctrine of *forum non conveniens*, made available by the enactment of the 1948 revisions to the Judicial Code, applied to cases pending at the time the act became effective. In *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967), this Court held the 1966 amendment to the general venue provisions of 28 U.S.C. § 1391(b) applied to pending cases, explaining "[t]his amendment does not change the substantive law applicable to this lawsuit. It is wholly procedural . . . As this Court said in applying

28 U.S.C. § 1404(a) to pending actions, 'No one has a vested right in any given mode of procedure.' " (citation omitted).

Like the statutes involved in those cases, the 1991 Act creates no new or different rights for victims of discrimination. It is well-recognized that the right to be free from unlawful discrimination in employment existed long before the enactment of the 1991 Act. Moreover, Congress expressly declared the elimination of discrimination to be the policy of this country as long ago as 1866 when the first civil rights statute was passed in the wake of the Civil War. Thus, the 1991 Act was enacted to protect further those long-standing rights, altering the remedies and procedures available to insure that employees are free from unlawful discrimination.

B. The Civil Rights Act of 1991 is a Procedural and Remedial Statute.

The 1991 Act, on its face, provides procedural and remedial measures to combat unlawful discrimination. The starting point for interpretation of any statute is the law's plain language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Civil Rights Act of 1991 is no exception. The plain language of the Act demonstrates the statute's remedial purpose and effect. Section 2 of the Act, entitled "Findings," specifically provides in relevant part:

> The Congress finds that—
>
> (1) *additional remedies* under federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

Civil Rights Act of 1991, § 2 (emphasis added). Similarly, Section 3 of the Act, entitled "Purposes," provides in relevant part:

> The purposes of this Act are—
>
> (1) to provide *appropriate remedies* . . .
>
> (2) *to codify* the concepts of 'business necessity' and 'job related' . . .
>
> (3) *to confirm* statutory authority . . .

Civil Rights Act of 1991, § 3 (emphasis added). Thus, it is plain from the language of the statute itself that Congress did not set out to enact legislation creating new rights for employees or to make unlawful previously lawful conduct.

The specific provisions of the 1991 Act further confirm the remedial purpose of this legislation. Title I of the Act is entitled pointedly: "Federal Civil Rights Remedies." Section 102 provides for and regulates the award of damages and the availability of jury trials. Section 103 provides for the recovery of attorneys fees. Section 105 codifies burdens of persuasion and proof in disparate impact actions. Section 113 provides for the recovery of expert fees. Section 114 provides for the recovery of interest and the extension of the limitations period. There can be no debate that such remedial provisions should be held to apply retroactively. *See, e.g., Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) (holding burden of proof to be remedial for purposes of retroactivity.)

None of these provisions creates new substantive rights for employees. None makes unlawful otherwise lawful conduct by employers in their employment

practices. None diminishes or destroys vested rights of employers. Instead, the provisions of the Act modify the procedures and remedies available to employees in actions to enforce their pre-existing right to be free from unlawful discrimination.

C. The Distinction Between Procedural and Substantive Amendments Reconciles the Apparently Competing Precedent in this Court in *Bradley* and *Bowen*.

The distinction between legislative changes which are procedural and those which are substantive reconciles two lines of precedent in this Court termed in "tension" and in "conflict" with one another. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Those two branches of decisions are represented on the one hand by *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), in which this Court applied a new law to pending cases, and *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), in which this Court declined to so apply a new law.

In *Bradley v. School Bd. of Richmond*, this Court considered the Emergency School Aid Act, 20 U.S.C. § 1617, which was promulgated as part of the Education Amendments of 1972, permitting the recovery of expenses and attorneys' fees for services rendered in a school desegregation case. This Court concluded that the Amendments should be applied retroactively, and that the petitioners should be entitled to recover expenses and attorneys' fees incurred in the pursuit of their claim. Clearly, under the procedural and substantive classification system, expenses and attorneys' fees are remedial measures. *See supra* at p. 24-26. Moreover, any statute which legislates such remedies must be considered procedural. Thus, *Bradley* could have

been decided identically under the procedural and remedial analysis illuminated above.

By contrast, *Bowen v. Georgetown University Hosp.* involved the application of the Medicare Act, 42 U.S.C. § 1395x(v)(1)(A). Under that statute, seven hospitals were required to repay over two million dollars to the federal government several years after the money had been paid out to the hospitals as Medicare reimbursement payments, in accordance with a reimbursement schedule that had a retroactive reach of three years. This Court concluded, without reference to *Bradley*, that such payments would be inappropriate. When viewed under the procedural and remedial distinction set forth above, the millions of dollars received by the hospitals as reimbursements plainly were seen by the majority in *Bowen* to have become vested and thus constituted a substantive right. The repayment of that sum was a substantive amendment to the hospitals' rights. As such, the reimbursement schedule could not be applied retroactively.[14] Thus, if this Court should hold the 1991 Act to apply to cases pending at the time of its enactment, it can reconcile the "apparent tension" between the *Bradley* and *Bowen* lines of cases.

CONCLUSION

Given this Court's long history of applying civil rights statutes to cases pending at the time of their enactment, and given the plain language of the Civil

---

[14] The procedural and substantive distinction need not be applied to determine the retroactivity of a statute which states clearly on its face, as does the Civil Rights Act of 1991, whether it is to be applied retroactively. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

Rights Act of 1991, the Act should apply immediately. If such application is not made, untold thousands will suffer the unjust dismissal of their claims and the inability to obtain any remedy for unlawful conduct by discriminating employers. Moreover, the judicial system will be clogged with cases that must be decided under long-repudiated law, and valuable judicial resources will be wasted for years to come. The Civil Rights Act of 1991 should be applied to cases pending at the time of its enactment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MAURICE RIVERS AND ROBERT C. DAVISON,

Petitioners,

v.

ROADWAY EXPRESS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, THE WOMEN'S LEGAL DEFENSE FUND,

(Additional *Amici* Listed on Inside Cover)

AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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FEMINIST MAJORITY FOUNDATION,
JAPANESE AMERICAN CITIZENS LEAGUE,
NATIONAL COMMITTEE ON PAY EQUITY,
NATIONAL COUNCIL OF JEWISH WOMEN,
NATIONAL COUNCIL OF NEGRO WOMEN, INC.,
NATIONAL ORGANIZATION FOR WOMEN,
NOW LEGAL DEFENSE AND EDUCATION FUND,
NATIONAL WOMEN'S CONFERENCE COMMITTEE,
NATIONAL WOMEN'S PARTY,
NORTHWEST WOMEN'S LAW CENTER,
PEOPLE FOR THE AMERICAN WAY,
U.S. SECTION OF THE WOMEN'S INTERNATIONAL
LEAGUE FOR PEACE & FREEDOM,
WOMEN EMPLOYED,
WOMEN'S LAW PROJECT, AND
YWCA OF THE U.S.A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
Petitioner,

v.

USI FILM PRODUCTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. 92-938

MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, THE WOMEN'S LEGAL DEFENSE FUND, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN LEGAL ADVOCACY FUND, AMERICAN CIVIL LIBERTIES UNION, AMERICANS FOR DEMOCRATIC ACTION, CALIFORNIA WOMEN'S LAW CENTER, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, EQUAL RIGHTS ADVOCATES, INC., FEDERALLY EMPLOYED WOMEN, INC., FEMINIST MAJORITY FOUNDATION, JAPANESE AMERICAN CITIZENS LEAGUE, NATIONAL COMMITTEE ON PAY EQUITY, NATIONAL COUNCIL OF JEWISH WOMEN,

**NATIONAL COUNCIL OF NEGRO WOMEN, INC.,
NATIONAL ORGANIZATION FOR WOMEN,
NOW LEGAL DEFENSE AND EDUCATION FUND,
NATIONAL WOMEN'S CONFERENCE COMMITTEE,
NATIONAL WOMEN'S PARTY,
NORTHWEST WOMEN'S LAW CENTER,
PEOPLE FOR THE AMERICAN WAY,
U.S. SECTION OF THE WOMEN'S INTERNATIONAL
LEAGUE FOR PEACE & FREEDOM,
WOMEN EMPLOYED,
WOMEN'S LAW PROJECT, AND
YWCA OF THE U.S.A.
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

INTEREST OF THE *AMICI CURIAE*

Amici curiae are 26 women's rights, civil rights, civil liberties, religious, and labor organizations that share a strong commitment to the eradication of all forms of discrimination in the workplace, including sexual and racial harassment. A number of the *amici* were substantially involved in presenting evidence to Congress of the need for the remedial legislation that became the Civil Rights Act of 1991, and all of the *amici* desire to present their perspective on these two extremely important cases.[1]

Congress passed the Civil Rights Act of 1991 in order to restore and strengthen federal civil rights protections, particularly as they pertain to discrimination in employment. The issue presented here is whether that statute applies to cases pending at the time of enactment. This Brief will not restate the analysis of the statute and its legislative history presented by the petitioners. Rather, it will focus upon the special concerns of Congress in addressing the evils of invidious discrimination in the work-

[1] The petitioners and respondents in both cases have consented to the filing of this Brief, and copies of the parties' consent letters have been filed with the Clerk. Appended to this Brief are statements of the individual organizations that have joined as *amici curiae*.

place, particularly the sexual harassment of working women, and upon the determination of Congress to ensure that adequate and effective remedies are available to all victims of such intentional discrimination.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991 ("the Act" or "the 1991 Act"), Pub. L. No. 102-166, 105 Stat. 1071, was passed by an overwhelming bipartisan majority of Congress, and signed into law by President Bush on November 21, 1991.[2] As confirmed by the congressional statements of findings and purpose and by the statute's legislative history, the Act was a remedial measure designed to close certain significant gaps in two principal civil rights laws, Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981 ("Section 1981").

In particular, the Act was intended to ensure that adequate remedies are available to compensate victims of invidious discrimination in the workplace. As Congress found, the subjection of employees to sexual, racial and/or other similar forms of harassment is a pervasive problem in our society, one that causes significant psychological, financial and often physical harm to its victims, as well as a loss of worker-productivity. Congress also found that, while such intentional discrimination is plainly proscribed by Title VII, the pre-Act unavailability of compensatory and punitive damages under Title VII often left victims of harassment without any effective remedy for the violation of their right to work in an environment free of such conduct. And although victims of racial harassment and other racially discriminatory employment conditions had previously been able to obtain compensation under Section 1981 for such intentional wrongdoing, this avenue of relief was foreclosed by the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

[2] The Act was passed in the Senate and the House by votes of 93-5 and 381-38, respectively. *Congressional Quarterly Almanac*, Vol. XLVII, 31-S and 94-H (1991).

In order to rectify this situation, the Civil Rights Act of 1991 provides for compensatory and punitive damages (within certain monetary limits) for the intentional violation of Title VII, and amends Section 1981 to make clear that the latter statute prohibits, *inter alia*, discrimination on the basis of race in all aspects of an employment relationship. The Act expressly states (in Section 402(a)) that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."

The sole issue presented in the instant cases is whether the Act applies to cases pending on its date of enactment. *Amici* respectfully submit that this question is answered in the affirmative by the plain language of Section 402(a), for the reasons set forth by the Ninth Circuit in *Reynolds* v. *Martin*, 985 F.2d 470 (9th Cir. 1993), and that this Court's inquiry should end there. *Amici* further submit, for the reasons discussed below, that the same conclusion is also required by long-standing judicial authority that permits—indeed obligates—the federal courts to provide an adequate remedy for the violation of federally-protected rights, absent an explicit prohibition of the remedy by Congress. *See, e.g., Franklin* v. *Gwinnett County Pub. Schools*, 112 S. Ct. 1028 (1992); *Bell* v. *Hood*, 327 U.S. 678 (1946). In this case, not only does no such limitation of remedies exist, but the Act demonstrates the intent of Congress that all necessary remedies be available to rectify intentional discrimination in the workplace. For these reasons, there is no need for this Court to engage in traditional "retroactivity" analysis. However, even assuming, *arguendo*, the relevance of such analysis, precedent of this Court compels the conclusion that the Civil Rights Act of 1991 applies to pending cases. *See, e.g., Bradley* v. *School Bd. of City of Richmond*, 416 U.S. 696 (1974).

A contrary holding would continue to subject a plaintiff such as petitioner Barbara Landgraf to the situation in which a federal court found that she had "suffered significant sexual harassment," *Landgraf* v. *USI Film*

Products, 968 F.2d 427, 429 (5th Cir. 1992), but no remedy was available for that egregious and intentional violation of federal law. Congress appropriately has determined that this situation is intolerable in a society that is striving for equality of treatment in the workplace, and there is no justifiable basis upon which that situation should be perpetuated by this Court.

ARGUMENT

I. THE CIVIL RIGHTS ACT OF 1991 WAS SPECIFICALLY INTENDED TO PROVIDE ADEQUATE REMEDIES TO VICTIMS OF SEXUAL HARASSMENT AND OTHER FORMS OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT

The Civil Rights Act of 1991 contains two significant remedial measures regarding invidious discrimination in employment. In Section 102 (codified at 42 U.S.C. § 1981a), the Act provides compensatory and punitive damages for the intentional violation of Title VII. And in Section 101 (which amends Section 1981 to make clear, in light of *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1969), that the statute prohibits race discrimination in all aspects of an employment relationship), the Act effectively restores the availability of the remedies of Section 1981 to victims of discriminatory conduct that continued to be unlawful under Title VII after *Patterson*.

In each instance, Congress was responding to overwhelming evidence that the remedies available in cases of intentional discrimination in employment were inadequate to redress the injuries caused by such discrimination. As an examination of the evidence presented to Congress demonstrates, these remedial deficiencies became most apparent to Congress in cases of sexual harassment, a form of discrimination that typically results in non-wage injuries that could not adequately be remedied by the equitable relief to which the courts had been limited under Title VII. Although the remedial issues considered by Congress certainly involved cases of

discrimination other than harassment, Congress found the inequities caused by the failure of existing remedies in harassment cases to be particularly persuasive of the need to expand those remedies. A review of the legislative record demonstrates that passage of the 1991 Civil Rights Act was driven in pertinent part by the response of Congress to such cases and its consequent determination to ensure the availability of adequate remedies to all victims of intentional discrimination in employment.

A. Title VII And Section 1981 As Previously Interpreted Were Inadequate To Redress Sexual Harassment And Other Forms Of Invidious Discrimination In Employment

The subjection of female workers to sexual harassment pervades our society; studies have shown that approximately 50% to 80% of women have experienced sexual harassment on the job. Matthew C. Hesse & Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 Washburn L.J. 574 (1985) (hereafter "*Dehumanizing Puzzle*"), at 575.[3] The great harms caused by sexual harassment—to the employers as well as to the victims—cannot be overem-

[3] Between 1980 and 1988, more than 38,500 sexual harassment cases were filed with the EEOC. *See* H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 40 n.29 (1990). This figure surely underrepresents the number of actual incidents; according to Women Employed, a Chicago-based organization that has advised and assisted thousands of women with employment discrimination problems, "approximately 80 percent [of the women whom they counsel] choose not to file discrimination charges, primarily because it just does not seem worth it." *The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess., Vol. 2 at 19 (1990) (statement of Nancy Kreiter). The problem is not confined to the private sector; according to a 1988 U.S. Merit Systems Protection Board survey, 42% of women working for the federal government reported that they had experienced sexual harassment in the two years prior to the survey. *See* H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 40 n.29 (1990).

phasized. A recent survey of 160 "Fortune 500" companies, for example, showed an average company loss of $6.7 million per year in decreased productivity, increased absenteeism and higher employee turnover caused by sexual harassment. James G. Frierson, *Sexual Harassment in the Workplace Costly in Production, Absenteeism, Turnover*, 8 Preventive L. Rep. 3, at 3 (June 1989). Victims of harassment experience personal degradation and humiliation, anxiety, stress, nervousness, depression, and loss of self-esteem, and suffer physical problems such as nausea, insomnia, headaches, loss of appetite and high blood pressure. *See* Sharon T. Bradford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 Yale L.J. 1611 (1990) (hereafter "Bradford"), at 1615; *Dehumanizing Puzzle, supra*, at 575 & n.9; and cases discussed *infra* pp. 10-16.

Nonetheless, despite the very real and tangible injuries caused by harassment, the civil rights laws have proven inadequate to remedy those injuries. Historically, Title VII has been interpreted by the courts as providing only equitable relief (*e.g.*, injunctions, back pay and reinstatement) but not legal relief (*e.g.*, compensatory and punitive damages) to remedy a violation. *See, e.g., Curran* v. *Portland Superintending Sch. Comm.*, 435 F. Supp. 1063, 1078 (D. Me. 1977).[4] While so-called "equitable" relief generally has been sufficient to remedy the wage-related consequences of discrimination, it has

[4] The view that compensatory and punitive damages were not available under Title VII (§ 706(g), 42 U.S.C. § 2000e-5(g)) was not universal, however. *See, e.g., Humphrey* v. *Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973) (compensatory damages available), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974); *Tooles* v. *Kellogg Co.*, 336 F. Supp. 14 (D. Neb. 1972) (punitive damages may be available). *See also* Bradford, *supra*; Michael J. Goldberg, Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 Harv. Civ. R.-Civ. Lib. L. Rev. 325, 330-34 (1974). Since the 1991 Civil Rights Act (42 U.S.C. § 1981a) expressly provides for damages in Title VII cases, the issue of whether Title VII previously should have been interpreted to include legal relief is now, of course, academic.

proven inadequate to deal with the consequences of invidious harassment and other non-wage-related injuries. The unavailability of compensatory and punitive damages under Title VII has left the victims of sexual harassment with no remedy at all for the types of non-wage injuries caused by such discrimination. *See generally* Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1464-65 (1984); Bradford, *supra*, at 1613-19. This unavailability of adequate remedies was described by Senator Kennedy, a principal sponsor of the 1991 Civil Rights Act, as "one of the most serious loopholes in existing law." 137 Cong. Rec. S15234 (daily ed. Oct. 25, 1991). *Accord* 137 Cong. Rec. S15490 (daily ed. Oct. 30, 1991) (statement of Sen. Durenberger terming the inadequacies of Title VII's remedies a "gigantic loophole in our discrimination laws").

The sexual harassment case at bar epitomizes the inadequacy of the equitable remedies to which Title VII plaintiffs have been restricted. Barbara Landgraf, a machine operator at a production plant, was subjected at work to "continuous and repeated inappropriate verbal comments and physical contact," as the trial court determined and as the respondents herein did not dispute at trial. *Landgraf*, 968 F.2d at 429, 432. Ms. Landgraf resigned and sued her employer under Title VII. However, because the trial court concluded that the resignation was not itself the result of discrimination, Ms. Landgraf received no equitable relief (such as back pay). *Id.* at 429-32. And even though Ms. Landgraf was the adjudicated victim of an intentional and undisputed violation of Title VII, she received no compensation for the humiliation and suffering caused by that violation—the harassment itself.

Barbara Landgraf's plight has been all too common. As Congress learned in considering the legislation that became the 1991 Civil Rights Act, *see infra* pp. 10-16, the unavailability of an adequate remedy for sexual harassment under Title VII created a class of persons whose

federal rights unquestionably had been violated but who could not obtain adequate relief for that violation. Employees who were subjected to a similar evil—racial harassment—fared no better under Title VII. *See, e.g., Williams* v. *Atchison, Topeka & Santa Fe Ry.*, 627 F. Supp. 752 (W.D. Mo. 1986) (African American male employee who was forced to endure racial slurs and "jokes" such as posting of Ku Klux Klan application on company bulletin board received judgment that employer had violated Title VII but was awarded no damages under Title VII for his resulting emotional and psychological problems, a situation the court "regretted").

Section 1981 historically has offered more expansive remedies to victims of race discrimination than has Title VII, including compensatory and punitive damages. *See, e.g., Johnson* v. *Railway Express Agency*, 421 U.S. 454, 460 (1975). *See also The Civil Rights Act of 1990: Hearing on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. (1990) (hereafter "*Civil Rights Act 1990 Senate Hearing*"), at 160-65 (statement of Prof. Eleanor Holmes Norton). However, this Court's decision in *Patterson* v. *McLean Credit Union* terminated the right of plaintiffs to sue under that statute for race discrimination involving the conditions of employment (such as racial harassment), as distinct from discriminatory practices in the creation of the employment contract itself. The combination of *Patterson* and the limited remedies then allowed under Title VII thus meant that victims of certain forms of intentional race discrimination in employment likewise had no adequate remedy for that wrongdoing.[5]

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[5] As of 1990, more than 200 claims of race discrimination had been dismissed by the federal courts as a result of the *Patterson* decision. S. Rep. No. 315, 101st Cong., 2d Sess. 13 (1990) (citing statement of Julius Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.). *See also* Women's Legal Defense Fund, *The Unjust Workplace: The Impact of the Patterson Decision on Women* (reprinted in *The Civil Rights Act of 1991:*

B. Congress Passed The 1991 Civil Rights Act Upon An Extensive Record Demonstrating The Remedial Inadequacies Of The Civil Rights Laws

In response to *Patterson* and several other decisions of this Court "that sharply cut back on the scope and effectiveness of these important federal laws" (*i.e.*, Title VII and Section 1981), *see* H.R. Rep. No. 40 Part II, 102d Cong., 1st Sess. 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, at 694, and in response to the remedial inadequacies of Title VII, Congress undertook to amend those statutes. In considering the proposed legislation that ultimately became the Civil Rights Act of 1991, Congress heard testimony from, *inter alia*, numerous individuals who had been sexually harassed at work in violation of Title VII, and/or who had been victimized by race discrimination in employment, yet who had received no compensation for the injuries that they had suffered as a consequence of that intentional wrongdoing. Many of these witnesses presented facts that had been adjudicated by federal courts as constituting intentional discrimination in violation of federal law. The painful testimony that they gave before Congress was a ringing indictment of the inadequacies of the laws to remedy such discrimination, and formed the basis on which Congress then acted.

1. *Sexual harassment*

For example, Carol Zabkowicz, a warehouse worker with the West Bend Company in Oak Creek, Wisconsin, described the vicious sexual harassment to which she had been subjected at work:

> My co-workers would constantly pull on my bra straps. One of my co-workers left a handwritten poem on my desk regarding my sex life with my husband. Another man would often call me a "sexy

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***Hearings on H.R. 1 Before the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 770-92 (1991)).**

> bitch" or "H and H," which I discovered meant "Hot and Horny." Still another would grab his penis in front of me and ask me if I could handle his "25 pounder." He would also call out to me. When I looked in his direction, he would be standing with his buttocks exposed.
>
> Another man also exposed his buttocks to me, and on occasion, would lift up the leg of the cutoff shorts he was wearing, call my name, and expose his testicles to me. This same man made a huge cardboard cutout of a penis, with which he would pretend to poke me in the buttocks when my back was turned.
>
> Yet another man would post drawings of caricatures of myself. These drawings would depict me naked, often performing sexual acts with either a human being or an animal. My initials would be written on the drawings.
>
> Because I knew these acts were wrong, I repeatedly reported this outrageous behavior to my immediate supervisor and my manager, but to no avail. . . . During this time, my emotional and physical health suffered. I was anxious, nervous, had poor concentration and cried easily. I suffered vomiting, severe nausea, diarrhea and cramping. My doctor testified at my trial that I suffered from a gastrointestinal disorder as a result of the harassment at work, and the judge accepted this as fact.
>
> In 1982, when I was pregnant with my second child, the harassment was still going on. My health continued to decline, and I started to lose weight. My OB-GYN, who was aware of my horrendous working conditions, told me that for the sake of my health, and the health of the child that I was carrying, I had to take a medical leave of absence from work, and I did this.

The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the

House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (hereafter *"Civil Rights Act 1990 House Hearings"*). Vol. 2 at 3-4.

A federal court found that Ms. Zabkowicz had been subjected to "a campaign of abuse" and "sustained, malicious, and brutal harassment." *Zabkowicz* v. *West Bend Co.*, 589 F. Supp. 780, 782, 784 (E.D. Wis. 1984), *aff'd in part and rev'd in part on other grounds*, 789 F.2d 540 (7th Cir. 1986). The court also found that despite Ms. Zabkowicz's repeated complaints about this unconscionable treatment, her employer for years "never conducted an investigation or disciplined a single employee," and held the employer liable for sexual harassment under Title VII. 589 F. Supp. at 785. Nonetheless, Ms. Zabkowicz was awarded only $2,763.20—back pay for wages lost during an illness caused by the harassment. *Id.* at 783, 785. Ms. Zabkowicz received no compensation for her medical bills or for her emotional distress. In fact, had she not become so physically ill that she could not work, Ms. Zabkowicz would have received no compensation at all despite having been victimized by intentional and sustained violations of federal law.

The case of Helen Brooms, a 36-year-old African American industrial nurse, was equally revealing of the inadequacies of Title VII. Ms. Brooms, a married mother of three, had been racially and sexually harassed by her supervisor and forced to leave her job as a result of the harassment. As a federal judge found, Ms. Brooms's supervisor had, among other things, made numerous explicit racial and sexual remarks to her and showed her pornographic photographs, including a "photograph depicting an interracial act of sodomy" which the supervisor told Ms. Brooms "showed the 'talent' of a black woman" and depicted the purpose for which she had been hired. *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 416-17 (7th Cir. 1989). In testimony before Congress, Ms. Brooms further described the harassment to which she had been subjected:

> He [the supervisor] told me I was "the best looking piece of ass" at a company party and asked if there was room in my pants for him. . . . He said he wanted to place salt on my genitalia and eat it off. He asked me to smoke marijuana with him for it made him oversexed. He remarked that I needed breast surgery.
>
> While attending an out-of-town conference, my boss propositioned me for sexual favors, described the size of his penis and said black women had, throughout history, borne white men's babies. I was so upset and frightened that as a result, I suffered severe rectal bleeding and required medical attention.

Civil Rights Act 1990 House Hearings, supra, Vol. 2 at 16-17.

The harassment of Ms. Brooms culminated in an incident in which her supervisor showed her a picture depicting bestiality and threatened to kill her if she did not submit to him. Ms. Brooms "ran from him, screaming in terror, and in [her] haste to escape, fell down a flight of stairs" and suffered permanent physical injury. *Id.* at 17. Although Ms. Brooms left her job, the effects of the harassment continued; as Ms. Brooms explained, she "suffered a severe and debilitating depression requiring psychiatric treatment [and] was unable to work." *Id.* Despite all her anguish and pain, Ms. Brooms received only an award of back pay, and this only because the trial court had concluded that the harassment was so severe as to constitute a constructive discharge. *Id.* at 16; 881 F.2d at 417. Ms. Brooms received no compensatory damages for any of the other consequences of the harassment, including her resulting medical bills and emotional distress.

Jacqueline Morris, a machinist at the American National Can Corporation, was similarly left without any remedy for the campaign of sexual harassment conducted against her by her co-workers. As she testified before Congress:

> On more than one occasion, the manager of forming operations for the plant touched my buttocks,

> told me that I "had a nice ass" and that he would "like to have a piece of that";
>
> At one staff meeting I asked my supervisor where I should sit, and he responded by moving my head down while saying something to the effect that "you might as well sit underneath my desk since that's where you do your best work";
>
> On more than one occasion, my immediate supervisor touched my breasts, touched my buttocks, made remarks to me such as "didn't you get any last night," and "do you spit or swallow," and made references to my breasts and buttocks;
>
> Numerous offensive materials were left at my work station, including a clay replica of a penis with steel wool testicles . . . .

The Civil Rights Act of 1991: Hearings on H.R. 1 Before the House Comm. on Education and Labor, 102d Cong., 1st Sess. (1991) (hereafter *"Civil Rights Act 1991 House Hearings"*), at 124.

After exhausting all internal grievance procedures, Ms. Morris filed a charge of discrimination with the EEOC, yet the harassment escalated. As she explained to Congress:

> At various times, I found the words "bitch," "slut," "whore" and "Jackie blows head" written on my desk or near my work station;
>
> A picture which showed a nude woman touching her breasts was left at my work station with a note that said "you should be doing this instead of [a] man's job";
>
> A substance which smelled like urine was put in the air line of my air compressor;
>
> A semen-like substance was left on the chair at my workbench.

Id. at 125.

As a result of the abuse, Ms. Morris suffered from breathing difficulties, nervousness, sleeplessness, and blotches and welts on her legs and back, all of which subsided whenever she took time off from work. Ultimately, a federal court found her employer liable for sexual harassment in violation of Title VII. *Morris* v. *American Nat'l Can Corp.,* 730 F. Supp. 1489 (E.D. Mo. 1989), *aff'd in part and rev'd in part on other grounds,* 941 F.2d 710 (8th Cir. 1991). Despite this violation of her federal rights—the details of which the Eighth Circuit called "sordid and egregious," 941 F.2d at 712—Ms. Morris received only retroactive seniority and back pay with interest for the work that she had missed, and nothing for the pain, suffering, humiliation, and health-related problems that she had endured. 730 F. Supp. at 1497-98.

The case of Patricia Swanson, another victim of sexual harassment, provided perhaps the most compelling example not only of the inadequacy of Title VII's remedies but also of the egregious and absurd results of that inadequacy when carried to its inevitable conclusion. As Ms. Swanson reported to Congress, the supervisor at the car dealership where she worked as an assistant finance manager had repeatedly made lewd, offensive and embarrassing comments to her, sometimes in the presence of other employees, had repeatedly attempted to unhook her bra, had run his hand up her skirt and grabbed her between her legs, had pulled down his pants and stood naked in front of her, and had repeatedly threatened that he would make her have sex with him. *Civil Rights Act 1990 Senate Hearing, supra,* at 186-88. This conduct caused Ms. Swanson to feel "like [she] was a prisoner in [her] own office . . . [and caused her migraine headaches] so bad [she] almost passed out." *Id.* at 188. Ms. Swanson was subsequently discharged.

Although Ms. Swanson filed suit, the response of the federal courts to the concededly unlawful conduct to which she had been subjected only served to compound

her suffering. Even though the trial judge found, and the Court of Appeals agreed, that Ms. Swanson had been sexually harassed, Ms. Swanson was awarded no relief because the courts concluded that she had been discharged for reasons unrelated to the harassment. And since no compensatory or punitive damages were available under Title VII to remedy the harassment, the defendant was considered to be the prevailing party and Ms. Swanson was ultimately ordered to pay the defendant's court costs. *Id.* at 188-89. *See Swanson* v. *Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989) ("since Swanson cannot recover any award under Title VII, [the defendant] must receive judgment even if there has been a violation of that statute"), *cert. denied*, 493 U.S. 1036 (1990).

In sum, and as stated to Congress by the American Bar Association, Title VII left "many victims of employment discrimination without remedies for their proven injuries and allow[ed] certain employers who discriminate to avoid any meaningful liability." *Civil Rights Act 1990 House Hearings, supra*, Vol. 1 at 533.

2. *Race discrimination*

As Congress further heard, victims of intentional race discrimination suing under Section 1981 fared no better after *Patterson*. For example, in the case of Bunny Kishaba, a woman of Hawaiian-Chinese ancestry who had been employed as an executive secretary for Hilton Hotels in Hawaii and who had sued Hilton for race discrimination, it was

> undisputed that [Kishaba's supervisor] McDonough made many derogatory and discriminatory remarks about various ethnic groups . . . . McDonough referred to a Japanese person as a "Jap" and compared local people to "the spics in New York," stating that locals are "not capable of being supervisors" and are "incompetent." . . . Kishaba witnessed racist behavior of a more subtle kind. When

> a Jewish group attempted to contact the executive office, McDonough told her to have D'Rovencourt take care of it because "he's our resident." She asserts that there was no doubt from his manner that he meant "resident Jew." . . . McDonough told her . . . "in a contemptuous way" that "I have to have the only secretary who does the hula." Additionally, McDonough frequently used the term "you people" in such phrases as "what's the matter with you people" or "if you people don't shape up, I'll get rid of all of you." Kishaba states that "there was no doubt whatever" that his references to "people" were to local Asians and Hawaiians.

Civil Rights Act 1990 House Hearings, supra, Vol. 1 at 176-77 (quoting *Leong* v. *Hilton Hotels Corp.*, 50 F.E.P. Cas. 738, 739 (D. Haw. 1989)). Nonetheless, the court held that, after *Patterson*, Ms. Kishaba's claim of racial harassment was no longer actionable under Section 1981. *Leong*, 50 F.E.P. Cas. at 741.[6]

The court in Ms. Kishaba's case also held that she could not obtain compensatory or punitive damages under Title VII, 50 F.E.P. Cas. at 741, thus underscoring the devastating effect that *Patterson* had, particularly on women of color victimized by harassment, by its elimination of an alternative to Title VII's inadequate remedies. This harsh reality was brought home to Congress by the evidence presented during the hearings on the 1991 Act. *See, e.g., Civil Rights Act 1991 House Hearings, supra*, at 770-92 (reprinting Women's Legal Defense Fund, *The Unjust Workplace: The Impact of the Patterson Decision on Women*).

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[6] *See also Civil Rights Act 1990 House Hearings, supra*, Vol. 1 at 177-78, discussing *Dangerfield* v. *Mission Press*, 50 F.E.P. Cas. 1171 (N.D. Ill. 1989), in which the court held that "contemptible" racist conduct to which the plaintiff employees allegedly had been subjected was not actionable under Section 1981 after *Patterson*.

3. *The response of Congress*

The witnesses who appeared before Congress were only a few of the many individuals who have been victimized by egregious and intentional acts of discrimination in violation of Title VII and/or Section 1981, yet who have received little or no compensation for their injuries.[7] Having heard from those victims, as well as from civil rights leaders, elected officials, and members of the academic and business communities, Congress realized the magnitude of the inequities caused by the remedial gap in Title VII and by *Patterson*.[8]

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[7] *See, e.g.*, National Women's Law Center, *Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy* (1991) and cases collected therein (reprinted in *Civil Rights Act 1991 House Hearings, supra*, at 581-629); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775 (1991) (offering additional case accounts).

[8] The remedial inadequacies of the civil rights laws were communicated to Congress by a wide variety of people and groups. *See* H.R. Rep. No. 40 Part I, 102d Cong., 1st Sess. 17-18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 555-56; *Civil Rights Act 1990 House Hearings, supra*, Vol. 2 at III-IV; *Civil Rights Act 1990 Senate Hearing, supra*, at III-VI. The need for strengthening Title VII's remedies had also been recognized by officials of government agencies involved in equal employment issues and by legal commentators. *See, e.g.*, Clarence Thomas, *Discrimination and Its Effects*, 21 Integrated Education 204 (1983) (arguing that "equitable remedies available under Title VII are not as compelling as the civil damages available under other federal statutes" and suggesting a need for more effective remedies); and authorities cited *supra* p. 7.

In addition, a number of federal courts had also recognized the failure of Title VII's "equitable" remedies. *See, e.g., Beesley* v. *Hartford Fire Ins. Co.*, 723 F. Supp. 635, 647 (N.D. Ala. 1989) (the lack of compensatory and punitive damages as a remedy makes "a Title VII sexual harassment claim, as a practical matter, meaningless"); *Stewart* v. *Thomas*, 538 F. Supp. 891, 897 (D.D.C. 1982) ("[t]o the extent that Title VII fails to capture the personal nature of the injury done to this plaintiff as an individual, the remedies provided by that statute fail to appreciate the relevant dimensions of the problem in this [sexual harassment] case");

In the 1991 Act, Congress made a reasoned judgment to rectify these inequities through two measures—the restoration of the law under Section 1981 as it had existed prior to *Patterson*, and the provision of compensatory and punitive damages under Title VII. This legislation not only took an important step toward closing the "gigantic loophole" in Title VII (caps were placed on damages), but addressed a serious problem that had particularly confronted women of color. Because of the remedial discrepancies that had existed between Title VII and Section 1981, women of color victimized by employment discrimination had been confronted with a legal system in which employer-defendants endeavored to pigeonhole their claims into a race-based or sex-based box, rather than recognize that such claims were generally inseparable. *See* Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775 (1991); Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 Journal of Legislation 30 (1981). With the 1991 Act, it is less likely that women of color will be subjected to artificial efforts to separate a single individual by race and gender.

By amending Section 1981 and adopting new Section 1981a, Congress sought to put an end to the violation of rights without remedies. This overarching purpose of the 1991 Civil Rights Act—to ensure that victims of invidious discrimination in employment have meaningful legal remedies—was effectively summarized by Senator Leahy, an original co-sponsor of the Act:

Compston v. *Borden, Inc.*, 424 F. Supp. 157, 162 (S.D. Ohio 1976) ("[w]ere compensatory damages available to a Title VII plaintiff, this Court would not hesitate to enter such an award in this case, because it is apparent from the evidence that [the plaintiff] suffered mental anguish and humiliation at defendants' hands").

Under existing civil rights laws, the best a woman who is intentionally harassed in the workplace can hope for from our legal system is a court order saying that her boss should stop. If her boss starts to harass her again, the only thing she can do is go back to court to get yet another order telling her boss to behave. . . . [W]ithout the improvements of the Civil Rights Act of 1991, there would be no penalty for the employer, no adequate compensation for the victim.

* * * *

[And if] . . . an employer intentionally harasses or otherwise persecutes an employee solely on account of race, the current civil rights laws cannot require the employer to compensate that person fully for the damage he has caused, no matter how great or how real. Nor can the employer be forced to pay punitive damages no matter how outrageous his conduct has been. By overturning the Supreme Court's decision in *Patterson* versus *McLean Credit Union*, the Civil Rights Act of 1991 would remedy this injustice.

The penalties for civil rights violations—for depriving citizens of the fundamental principles of equality and fairness on which this Nation was founded—should not be inferior to legal claims for breaching a contract, violating the Sherman Act, or infringing a copyright. This bill goes a long way toward setting this priority straight and *recognizing the importance of protecting all Americans from discrimination by providing a meaningful legal remedy.*

137 Cong. Rec. S15489 (daily ed. Oct. 30, 1991) (emphasis added).[9]

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[9] *See also* 137 Cong. Rec. H9532-33 (daily ed. Nov. 7, 1991) (statement of principal sponsor Rep. Fish noting that Congress is "united in again responding appropriately to the reality of discrimination" by "provid[ing] a necessary remedy [monetary relief] for those who continue to be victimized" and by "effectively overturn[ing] Supreme Court rulings because we cannot ignore the judicial erosion of important protections for women and members of minority groups"); H.R. Rep. No. 40 Part I, 102d Cong., 1st Sess. 64-65 (1991), 1991 U.S.C.C.A.N. at 602-03 ("[m]onetary damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity"); 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (statement of principal sponsor Rep. Edwards noting that "[c]ompensatory damages are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms" and further stating that "Section 101 fills the gap in the broad statutory protection against intentional racial and ethnic discrimination covered by Section 1981 . . . that was created by the Supreme Court decision in *Patterson*").

Despite the clear purpose of Congress in passing the 1991 Act and the extensive and explicit record on which Congress acted, the respondents in the instant cases would have this Court continue to apply a remedially-deficient civil rights jurisprudence. For the reasons set forth below, this Court should decline that invitation to prolong the injustice that Congress so plainly intended to end.

II. THE FEDERAL COURTS ARE OBLIGATED TO PROVIDE AN ADEQUATE REMEDY FOR THE VIOLATION OF A FEDERAL RIGHT, UNLESS THAT REMEDY IS SPECIFICALLY FORECLOSED BY CONGRESS—WHICH IS NOT THE CASE HERE

The instant cases, if not reversed, would perpetuate the situation in which federal rights can be violated without an adequate remedy being accorded to the victims—the very situation that Congress intended to eradicate by passage of the Civil Rights Act of 1991. This Court should reverse the judgments below based on the long-established principle that a federal court is obligated to ensure an adequate remedy for a violation of federal law, provided that the remedy has not been foreclosed by Congress.

It is well-settled that for every available statutory right there must be an appropriate remedy for a deprivation

of that right. Chief Justice John Marshall stated in 1803 what has been a guiding legal principle ever since: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . '[E]very right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Blackstone *Commentaries* 109).

This rule guarantees to victims of statutory violations that courts will provide the necessary remedies, particularly when the violations are of federal law. As this Court has stated on repeated occasions:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Bell v. *Hood*, 327 U.S. 678, 684 (1946) (footnotes omitted); *accord Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964).

This Court reaffirmed the vitality of this important and bedrock legal doctrine as recently as last Term. In *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), the Court held that compensatory damages are available as a remedy in a private action challenging an intentional violation of Title IX of the Education Amendments of 1972 ("Title IX").[10] The Court reached this conclusion by applying the rationale of *Bell* v. *Hood* and its progeny, and stated that damages must be made

[10] The private right of action is not expressly authorized by Title IX but was itself deemed to exist by this Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

available because, without them, the federal remedy would clearly be inadequate and would in fact "accord[] . . . no remedy at all." 112 S. Ct. at 1038.

The one exception to the requirement that all appropriate relief be awarded in any action to vindicate a federal right is in those instances in which there exists a clear indication of a contrary legislative intent. As this Court stated in *Franklin*, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 112 S. Ct. at 1032 (citing *Davis* v. *Passman*, 442 U.S. 228, 246-47 (1979)).

No contrary congressional expression exists here. Whether or not Title VII as originally enacted allowed compensatory and punitive damages, *see supra* note 4, 42 U.S.C. § 1981a now plainly does, and that statute, which is Section 102 of the 1991 Act, contains no bar to its application in pending cases.[11] In *Franklin*, this Court refused to create a remedial bar not imposed by Congress, and it should do the same here. Indeed, given the plain language of 42 U.S.C. § 1981a, the express recognition by Congress of the inadequacy of Title VII's remedies, and the intent of Congress to ensure the availability of compensatory and punitive damages and put an end to cases such as that of Pat Swanson, Helen Brooms—and Barbara Landgraf—it would be highly anomalous for this Court to continue to apply Title VII in a limited remedial manner.[12]

[11] By contrast, *see* Sections 109(c) and 402(b) of the Act (42 U.S.C. § 2000e note and 42 U.S.C. § 1981 note, respectively), which contain express prohibitions on retroactive application of the section of the Act that overturns *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), and of the entire Act to certain defined "disparate impact cases" (*i.e.*, *Wards Cove Packaging Co.* v. *Atonio*, 490 U.S. 642 (1989)).

[12] Indeed, given the decision in *Franklin*, one court has recently concluded that Title VII itself (as distinct from 42 U.S.C. § 1981a) should be interpreted to allow compensatory and punitive damages. *See Berry* v. *Stevinson Chevrolet*, 804 F. Supp. 121, 136-37 (D. Colo. 1992).

Similarly, Congress recognized that *Patterson* had created an untenable remedial problem for victims of intentional race discrimination in employment. Although the right to a workplace free of such discrimination continued under Title VII after *Patterson*, the comprehensive remedy for a violation of that right provided by Section 1981 was no longer available. Section 1981 as amended by Section 101 of the 1991 Civil Rights Act thus restores those remedies for the violation of rights that existed at all relevant times. Like Section 102 of the Act, Section 101 contains no bar to retroactive application. *Bell* and *Franklin* thus require that Section 1981 as amended by the Act be applied in pending cases so that adequate remedies will be available to victims of intentional race discrimination in employment.

The obligation of the courts to provide an adequate remedy for the violation of an employee's right to a workplace free of invidious discrimination, through the application of 42 U.S.C. § 1981a and Section 1981 as amended by the 1991 Act, is not only required by *Bell* and *Franklin*, but would comport with the goal of the civil rights laws to end "the injustices and humiliations of racial and other discrimination," H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2394, and serve to effectuate the "purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). *Accord Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). As this Court stated in *County of Washington* v. *Gunther*, 452 U.S. 161 (1981), "a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. *We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.*" *Id.* at 178 (emphasis added, citation omitted).

It is undisputed that Barbara Landgraf suffered "significant sexual harassment at the hands of [a co-worker]," *Landgraf*, 968 F.2d at 429, a clear and intentional violation of Title VII, yet she received no relief for the resulting injuries. Similarly, the petitioners in *Rivers* had the remedies previously available to them under law taken from them as a result of this Court's ruling in *Patterson*. Both cases now before this Court involve precisely the type of injustice that Congress sought to rectify with passage of the 1991 Act, *i.e.*, the violation of rights without remedies. (Indeed, the similarities between *Landgraf* and *Swanson* are quite striking.) It would be directly contrary to the teachings of *Bell* and *Franklin* for the Court—in the absence of a clear statutory directive—to refuse to apply the relevant sections of the 1991 Civil Rights Act to pending cases and thus continue to turn away victims of intentional discrimination without affording them adequate relief. And it would be particularly ironic for the Court to do so in a sexual harassment case—the paradigm of what prompted Congress to act.

III. ASSUMING, *ARGUENDO*, THE APPLICATION OF RETROACTIVITY ANALYSIS, PRECEDENT REQUIRES THAT THE CIVIL RIGHTS ACT OF 1991 BE APPLIED TO PENDING CASES

For the reasons discussed above, *Bell* v. *Hood* and its progeny compel the application of the Civil Rights Act of 1991 to pending cases so that prevailing plaintiffs may be afforded a remedy for the violation of their federally-protected rights. Thus, these cases do not implicate traditional "retroactivity" analysis. However, assuming, *arguendo*, that this Court determines to apply such analysis, *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974), requires that the Civil Rights Act of 1991 be applied to cases pending at the time of enactment.

In *Bradley*, a unanimous Court (with two Justices not participating) held that a statute granting the federal courts the authority to award reasonable attorneys' fees in school desegregation cases applied to counsel's services rendered prior to enactment of the statute. The Court noted that its holding was "anchor[ed] . . . on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.[13]

With respect to the 1991 Civil Rights Act, neither of these two exceptions to the *Bradley* rule exists. As the Briefs of the petitioners demonstrate, there is no "statutory direction or legislative history" that requires the prospective application of the Act except with respect to certain specific sections not at issue here. *See supra* note 11. To the contrary, and for the reasons set forth in *Reynolds* v. *Martin*, 985 F.2d 470, the plain language of the Act requires that the statute be applied to pending cases, except as otherwise expressly provided, which should end the inquiry.

Assuming, *arguendo*, that one disagrees with *Reynolds*, the most that can be argued in favor of a prospective application of the Act based on the statute and its legislative history is that they are ambiguous as to that issue; even the courts that have held the Act to be prospective

[13] While an "apparent tension" has been observed between *Bradley* and the subsequent opinion in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988) (*see Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990)), *Bowen* in fact involved the potential retroactivity of an administrative rule, and its holding turned on the agency's lack of authority to adopt retroactive rules. By contrast, *Bradley* and the instant cases involve civil legislation duly enacted by the Congress of the United States, which plainly does have the authority to enact retroactive civil statutes. In any event, further analysis of this issue is beyond the scope and purpose of this Brief *amici curiae*, and *amici* respectfully refer the Court to the Briefs of the petitioners on this issue.

only have had to concede this—including the courts in the two cases now before this Court. *See, e.g., Harvis* v. *Roadway Express, Inc.*, 973 F.2d 490, 496 (6th Cir. 1992) (referring to the Act's "ambiguous legislative history and language"); *Landgraf*, 968 F.2d at 432 ("there is no clear congressional intent on the general issue of the Act's application to pending cases"). Under *Bradley*, an ambiguous legislative history that can be read as supportive of either retroactivity or prospectivity provides "at least implicit support for the application of the statute to pending cases," 416 U.S. at 716, and is not a bar to such application. Thus, the exception to the *Bradley* norm of retroactivity based on a congressional directive of prospectivity is inapplicable here.

The other exception to the *Bradley* rule—manifest injustice—is equally inapplicable. The *Bradley* Court articulated a three-part test as a guide in determining "the possible working of an injustice" in the application of a new statute to pending cases; that test examines "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. An application of that test in the instant cases confirms that no "manifest injustice" would result from holding the Act applicable in these cases.

First, while these cases technically involve disputes between private parties, Title VII and Section 1981 are intended to create a society free of invidious discrimination. Plaintiffs who successfully sue under these statutes thus advance important federal goals, and are therefore considered to be acting as private attorneys general in effectuating those goals. *See, e.g., Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978) (Title VII plaintiff "is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority' " (citation omitted)); *Brown* v. *Culpepper*, 559 F.2d 274, 277-78 (5th Cir. 1977) (Section 1981). It is significant to note that in *Bradley* itself, this Court recog-

nized the public importance of school desegregation cases in part by comparing them with suits brought to enforce the Civil Rights Act of 1964 (of which Title VII is a part), noting that private litigation is a necessary means of securing broad compliance with such laws. 416 U.S. at 719.

Like the school desegregation statute at issue in *Bradley*, Title VII and Section 1981 involve "great national concerns" and must therefore be decided "according to existing laws." *Bradley*, 416 U.S. at 719 (citing *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). Thus, application of the first part of the *Bradley* "injustice" test favors retroactivity.

The second part of that test likewise provides no support for prospectivity, since application of the 1991 Civil Rights Act to pending cases would not "infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720. Simply put, no one has a right to violate federal law, and federal law at all relevant times has prohibited invidious discrimination in employment. As Congress recognized in 1990, "[t]wenty-six years after Title VII of the Civil Rights Act of 1964 was enacted . . . [v]irtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally." H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 9 (1990). The hostile work environment to which Barbara Landgraf was subjected unquestionably violated Title VII, as the lower courts found. And the discriminatory conduct of the respondent in *Rivers* as alleged violated both Title VII and Section 1981 as then interpreted by the courts.[14]

[14] It should be kept in mind that hundreds of pending Section 1981 cases were dismissed by the lower courts *and jury awards in favor of plaintiffs* overturned following this Court's decision in *Patterson*, although the conduct at issue in those cases was recognized to be unlawful under Section 1981 (and Title VII) prior to that decision. *See supra* note 5; H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 18 (1990); *Civil Rights Act 1990 House Hearings*, *supra*, Vol. 3 at 311-14 (statement of Patricia Carroll). Given the courts' retroactive application of *Patterson* to pre-*Patterson* conduct and cases, it would be most ironic and unjust for the corrective legislation not to be applied in the cases of numerous plaintiffs who would otherwise be caught in a judicially-created remedy gap, and it would create a windfall for defendants who had intentionally engaged in discriminatory conduct understood to be unlawful.

The final prong of the "injustice" test examines the "possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720. This concern is not implicated here for the very reasons set forth by this Court last Term in *Franklin* v. *Gwinnett County*. In its ruling that compensatory damages are available in Title IX cases in which intentional discrimination is alleged, this Court held that no notice problem arises, precisely because the violation is intentional. *See Franklin*, 112 S. Ct. at 1037. The instant cases likewise involve adjudicated or alleged acts of *intentional* discrimination, and the statutes at issue here, 42 U.S.C. §§ 1981 and 1981a, apply only to intentional discrimination. Thus, the respondents in the instant cases can have no more claim of "injustice" or "unfairness" in the availability to the petitioners of an effective remedy for intentional wrongdoing than did the defendants in *Franklin*. The Court properly rejected such a notion in *Franklin* and it should likewise do so here.[15]

In sum, *Bradley* demonstrates that there would be no "injustice," let alone "manifest" injustice, in applying the Civil Rights Act of 1991 to pending cases. Indeed, for all the reasons discussed in Sections I and II, *supra*, it would be manifestly unjust to continue to leave victims of intentionally unlawful conduct without an adequate

[15] The fact that a prayer for compensatory damages would give a defendant the right to a jury trial or require "a retrial on damages before a properly instructed jury" does not implicate the "manifest injustice" exception to retroactivity. *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981).

remedy and permit the wrongdoers to escape without liability, or, even worse, with an order that their court costs be paid by their victims.

CONCLUSION

The decision of the Court of Appeals in each of these cases should be reversed and remanded.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INDIVIDUAL *AMICI CURIAE*

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC strongly supported enactment of the Civil Rights Act of 1991 and believes that the amendments made by the Act are properly applied to litigation pending on the date of its enactment.

The Women's Legal Defense Fund (WLDF) is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender.

The American Association of University Women (AAUW) has promoted equity and education for women and girls since 1881. AAUW's 130,000 members are committed to achieving equal opportunities and fair treatment for women in the workplace.

The American Association of University Women Legal Advocacy Fund provides funding and a support system for women seeking judicial redress for sex discrimination. Since it was founded in 1981, the Legal Advocacy Fund has supported the lawsuits of more than 22 women

filing employment discrimination cases against institutions of higher education.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and enhancing the fundamental civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination in our society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination in our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court and worked for the passage of the Civil Rights Act of 1991.

The Americans for Democratic Action, a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others.

The California Women's Law Center (CWLC) is a private, non-profit public interest law center specializing in the civil rights of women and girls. CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: sex discrimination, including sex discrimination in education, reproductive rights, family law, violence against women, child care, and discrimination in employment. The application of the Civil Rights Act of 1991 will have a far reaching impact on women who are currently pursuing their rights through the courts and who will be left without a remedy if the Civil Rights Act of 1991 is limited in its application.

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy

institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of more than 65 international unions. CLUW has 45 active chapters and a National Executive Board composed of the female leadership of these international unions. A primary purpose of this national coalition is to remove all forms of discrimination from the workplace.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and education corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law that affect equality between the sexes. Since its inception almost 20 years ago, ERA has specialized in litigating employment discrimination cases, many of which are Title VII cases. By extending the benefits of the Civil Rights Act of 1991 to pending cases, society will be able to move more quickly to end unfair treatment and assure equality to all of its citizens.

Federally Employed Women, Inc. (FEW) is an international non-profit organization representing over one million civilian and military women employed by the federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and enhance career opportunities for women in government. Recognizing the need for full enforcement of Title VII of the Civil Rights Act of 1964, as amended, FEW strongly supported enactment of the Civil Rights Act of 1991 and remains committed to ensuring that the procedures and remedies under that statute are fully

available to all victims of employment discrimination, including those persons whose cases were pending on its effective date.

The Feminist Majority Foundation is a non-profit, 501(c)(3) research and education organization, which seeks to transform the public debate on issues of importance to women's lives, and to empower women through educational and research projects. The Foundation is committed to eradicating gender and racial discrimination and sexual harassment in the workplace and in all sectors of society.

The Japanese American Citizens League (JACL) is the largest Asian American civil and human rights organization in the United States, consisting of 113 chapters nationwide. Since its formation as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in many legal actions that have challenged racial discrimination against Japanese Americans and other Asian Americans. It has also supported the passage of legislation aimed at eradicating discrimination based on race, national origin, gender, religion, sexual orientation and disabilities.

The National Committee on Pay Equity (NCPE) is a coalition of labor unions, women's and civil rights organizations - working exclusively on the problems of wage discrimination against women and people of color. NCPE represents the interests of over 20 million working Americans and worked in coalition with other civil rights organizations to enact the Civil Rights Act of 1991. We feel strongly that the Civil Rights Act Amendments should apply to all cases pending on the date the legislation became law, not just to those concerning conduct after the date of enactment. This issue is vital to safeguarding the rights of workers and ensuring that the law consistently and thoroughly protects workers against discriminatory conduct at the hands of employers.

The National Council of Jewish Women (NCJW), founded in 1893, is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 500 communities nationwide dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. An active supporter of the Civil Rights Act of 1991 and its application to pending cases, the National Council of Jewish Women believes that individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society. Based on NCJW's *National Resolutions* stating our resolve to work for the "enforcement of sexual harassment laws and more stringent penalties for violators," we join this Brief.

The National Council of Negro Women, Inc. (NCNW) is a voluntary, community-based, non-profit membership organization founded in 1935. It has 33 National affiliate organizations and 250 community-based sections with an outreach to four million women. NCNW affirms its support of this *amicus* Brief in support of the application of the Civil Rights Act of 1991 to pending cases. As African American women, the issues of race discrimination and sexual harassment are of our utmost critical concern. Without application of the 1991 Act to pending cases, many victims of discrimination will be without recourse to address these egregious acts.

The National Organization for Women (NOW) is the nation's largest organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. NOW has, since its inception, endorsed and promoted civil rights for all people. Hence, NOW actively worked for the passage of the Civil Rights Act of 1991 and supports its application to pending cases as an important element of full protection against employment discrimination.

The NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of the laws prohibiting employment discrimination, including *Robinson* v. *Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending* (11th Cir. argued Dec. 2, 1992).

The National Women's Conference Committee, appointed under Public Law 94-167 to implement the 1977 National Plan of Action for Women, is committed to address both sexual harassment (on which it has a national task force) and race discrimination (as addressed in the National Plan).

The National Women's Party was founded in 1913 by Suffragist Alice Paul, who was instrumental in passage of the 19th Amendment granting women the right to vote and who wrote the Equal Rights Amendment in 1923. Since the National Women's Party believes that all persons should be treated equally under the law regardless of gender, race or class, we join with the National Women's Law Center in support of applying the Civil Rights Act of 1991 to pending cases. Prevailing plaintiffs should be allowed a remedy for the discrimination they suffered and should not be deprived of a remedy because of the timing of the discrimination.

The Northwest Women's Law Center is a non-profit organization in Seattle, Washington, that works to advance the legal rights of women through litigation, education, and legislative advocacy, and by providing information and referrals to women with legal problems. One of the Law Center's priorities is the elimination of sex discrimination in employment. The Law Center has participated in several cases involving sex discrimination in employment before the United States Supreme Court, including *Price Waterhouse* v. *Hopkins* and *California Federal Savings & Loan Association* v. *Guerra*.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including supporting the enactment of the Civil Rights Act of 1991, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias, injustice and discrimination.

The U.S. Section of the Women's International League for Peace & Freedom is pleased to join this Brief in support of the application of the Civil Rights Act of 1991 to pending cases. We have long worked to end inequity and discrimination of all kinds.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination, especially in the area of sexual harassment. The organization has a long history of monitoring the performance of equal employment opportunity enforcement agencies, analyzing equal opportunity policies,

and developing detailed proposals for improving enforcement efforts.

The Women's Law Project (WLP) is a non-profit, feminist legal advocacy organization, located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past nineteen years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sex and race discrimination in the workplace, and in the availability of the strong and effective remedies of the Civil Rights Act of 1991 to cases pending on the date of its enactment.

The YWCA of the U.S.A. is a national women's membership organization committed to the empowerment of women and the imperative to eliminate racism. Strengthened by diversity, the Association draws together members from varied economic, racial, ethnic, age, and religious groups who strive to create opportunities for women's growth, leadership and power. Because of our mission to obtain peace, justice, freedom and dignity for all people, we join as *amicus curiae* in support of the application of the Civil Rights Act of 1991 to cases pending on the date of its enactment.

Nos. 92-757 and 92-938

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,

Petitioner,

—v.—

USI FILM PRODUCTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAURICE RIVERS and ROBERT C. DAVISON,

Petitioners,

—v.—

ROADWAY EXPRESS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, INC., AND ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, AS MEMBERS OF NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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April 30, 1993

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INTEREST OF AMICI CURIAE

This brief is respectfully submitted by the Asian American Legal Defense and Education Fund, the Asian Law Caucus, Inc., and the Asian Pacific American Legal Center of Southern California, as members of the National Asian Pacific American Legal Consortium, Inc., and other Asian American civil rights and civil liberties groups[1] as amici curiae in support of petitioners' appeals from the decisions below holding that the Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act" or the "Act") does not apply to cases pending when it became law. For the reasons set forth below and in the briefs of petitioners and other amici in support of petitioners, the amici herein urge the Court to reverse and hold that the Act *does* apply to pending cases.

Employment discrimination is one of the principal problems facing Asian Americans today, and all the amici herein are committed to the goals of eliminating discrimination in employment against Asian Americans and ensuring the fair and equal treatment of Asian Americans in all aspects of society.[2]

The United States Commission on Civil Rights recently highlighted the problems encountered by Asian Americans in employment:

> Asian Americans face a number of barriers to equal participation in the labor market. Many of these barriers are

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1 Petitioners and respondents in both cases have consented to the filing of this brief. Appended to this brief are statements of the organizations that have joined in this brief as amici curiae.

2 With a population of roughly 7.3 million, Asian Americans today make up almost 3% of the population of the United States. Over the past decade, Asian Americans have increased dramatically in number from 1.5% to 2.9% of the total population. The rate of the population growth of Asian Americans in the United States from 1980 to 1990 was 107.8%, more than double the rate for Hispanics (53%) and far exceeding the rates for Whites (6%) and Blacks (13.2%) during the same period. United States Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (February 1992) ("USCCR Report") at 13-15.

> encountered to a greater degree by the foreign born, who often confront linguistic and cultural barriers to finding employment commensurate with their education and experience, but even third- or fourth-generation Asian Americans find their employment prospects diminished because employers have stereotypical views of Asians and prejudice against citizens of Asian ancestry. Employment discrimination, to varying degrees, is a problem facing all Asian Americans. . . . [E]mployment discrimination against Asian Americans ranges from discrimination based on accent or language, to discrimination caused by our nation's immigration control laws, to artificial barriers preventing many Asian Americans from rising to management positions for which they are qualified.

USCCR Report at 130.

Hence, the issue of the applicability of the 1991 Act to pending cases is a question of great importance to the Asian American community, for if the decisions of the Fifth and Sixth Circuits in these cases are affirmed, many victims of employment discrimination will find themselves with drastically limited remedies—or no remedy at all. As this Court has repeatedly recognized, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), is to be construed liberally to further its goals of eradicating discrimination and making victims of discrimination whole; those goals will only be frustrated by affirmance of the decisions below.

The language of the 1991 Act strongly supports the view that it should be applied to pending cases generally, for Section 402(a) states that "this Act shall take effect upon enactment." When Congress did not want the Act to be applied to a particular pending case or to particular conduct that occurred before its enactment, Congress *explicitly* so provided. From the point of view of the Asian American community, the irony is that Congress explicitly provided that the 1991 Act was not applicable to a pending case that had been brought by a group of Asian Pacific American workers. Section 402(b) explicitly

provides that the Act shall not be applied to *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Although the Act was passed in part because of Congress's recognition that the *Wards Cove* decision "weakened the scope and effectiveness of Federal civil rights protections" (1991 Act § 2), the workers who had fought the *Wards Cove* case for twenty years were explicitly denied the Act's protections. While the *Wards Cove* exemption should certainly be repealed,[3] its inclusion demonstrates that the Act should be applied to pending cases generally.

ARGUMENT

POINT I

THE PLAIN LANGUAGE OF THE 1991 ACT REQUIRES THAT IT BE APPLIED TO PENDING CASES

The plain language of the 1991 Act demonstrates that it should be applied to pending cases. First, Section 402(a) of the 1991 Act states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect *upon enactment*." (Emphasis added). This language plainly provides for the 1991 Act to take effect immediately, and it gives " 'some indication that [Congress] believed that application of [the Act's] provisions was urgent'." *Estate of Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993) (quoting *In re Reynolds*, 726 F.2d 1420, 1423 (9th Cir. 1984)). More-

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3 The *Wards Cove* exemption is being attacked on both the legislative and judicial fronts. A bill to amend the 1991 Act by deleting Section 402(b) is pending in the House of Representatives. H.R. 1172, 103d Cong., 1st Sess., entitled "The Justice for *Wards Cove* Workers Act." The *Wards Cove* case is itself still being litigated in the Ninth Circuit, and some of the amici herein have argued that the *Wards Cove* exemption in the 1991 Act violates the Equal Protection Clause of the Constitution by singling out a group consisting primarily of Asian American workers and that it also violates the Separation of Powers Clause in that Congress has impermissibly attempted to control the outcome of a particular litigation. *Antonio v. Wards Cove Packing Co.*, Nos. 91-35306, 91-35861 (9th Cir.).

over, the language of Section 402(a) does not on its face exclude or carve out any exception for pending cases.

Second, when Congress did *not* want provisions of the 1991 Act to apply retroactively, it *explicitly* so provided. Thus, Section 402(b)—the *Wards Cove* exemption—declares that "nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."[4] Likewise, Section 109(c) of the Act, which extends Title VII to United States citizens working for American companies abroad, states that it "shall not apply with respect to conduct occurring before the date of the enactment of this Act."

When Sections 402(a), 402(b) and 109(c) are read together, it is clear that the "[e]xcept as otherwise specifically provided" language in Section 402(a) refers to Sections 402(b) and 109(c), for those are the "only provisions of the Act that can be read as specifically departing from the general rule." *Estate of Reynolds*, 985 F.2d at 473. Hence, when read in the light of the 1991 Act as a whole, Section 402(a) can only mean that the Act *must* be applied to pending cases in general. Any other interpretation would render Sections 402(b) and 109(c) meaningless, thereby violating the basic tenet of statutory construction that a statute is not to be read so that any portion will be rendered superfluous. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative' ") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Several courts have held that Sections 109(c) and 402(b) were intended merely as "insurance policies" to protect against retroactive application of the two provisions in the event that the courts were to determine that the 1991 Act as a whole was

4 The only case that fits this description, of course, is *Wards Cove*.

to be applied to pending cases. *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 890 (D.C. Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377 (8th Cir. 1992) ("retroactivity opponents 'hedged their bets' by expressly making specific provisions . . . prospective only"). Although the courts in *Gersman* and *Fray* acknowledged that Sections 109(c) and 402(b) would be rendered inoperative by a decision that the 1991 Act did not apply to pending cases, they reasoned that this was precisely what Congress intended.

The reasoning of the courts in *Gersman* and *Fray* should be rejected, for it undermines the long-standing principles of statutory construction set forth in *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510 n.22. Moreover, as the Ninth Circuit recognized in *Estate of Reynolds*, 985 F.2d at 478, Sections 109(c) and 402(b) are not worded as mere "redundant assurances," and if they were only intended to be "insurance policies," they would have been worded differently. As the court observed:

> If the statutory language of those sections read: "Notwithstanding any judicial construction concerning the retroactivity of this Act in general, this section shall not apply with respect to conduct occurring before the date of enactment of this Act," we would have an entirely different case. But sections 402(b) and 109(c) as actually enacted simply do not read like insurance clauses.

985 F.2d at 478.

The Ninth Circuit recognized in *Estate of Reynolds* that some members of Congress probably voted in favor of Sections 402(b) and 109(c) with the belief that these sections would be construed by the courts as "insurance" clauses, and that other members probably voted for these sections with the belief that the language of these sections would compel the courts to find that the 1991 Act in general applied to pending cases. Given the "clear text of the Act," the court held that those individual members' beliefs are unimportant. 985 F.2d at 478. Regardless

of the beliefs of individual members of Congress as to the desirability of applying the Act to pending cases, "the legislators as a body enacted a statute that, consistent with established principles of statutory construction, can only be read one way," *id.*, namely, in favor of application to pending cases.

Finally, the plain language of the 1991 Act should be construed in light of Supreme Court precedent requiring the liberal construction of civil rights laws, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, 228, 233 n.20 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), which, as set forth at Point II, *infra*, supports the application of the 1991 Act to pending cases.

POINT II

THE PUBLIC POLICY CONSIDERATIONS STRONGLY SUPPORT APPLICATION OF THE 1991 ACT TO PENDING CASES

A. The Purposes of the 1991 Act

In the year prior to the enactment of the 1991 Act, Congress appointed a committee of lawyers and judges to study the Federal court system. The committee found that, because the remedies available to victims of employment discrimination were generally limited to backpay, the monetary stakes were often so small that, "even with the potential to recover attorneys fees, claimants sometimes find it difficult to litigate in Federal court because they cannot find counsel to take their cases." Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. Times, July 24, 1991, p. A1, As a result, individuals who have been denied employment opportunities on the basis of race or sex, or any other basis unlawful under Title VII, have been left without a remedy, and a legislative scheme that relies heavily on the work of "private attorneys general" has been hindered by the economic impediments to the vindication of federal statutory rights by individuals.

Thus, when it enacted the 1991 Act, Congress expressly found that additional remedies were needed both to provide victims of discrimination with additional protections against discrimination, and to enhance the effectiveness of the laws prohibiting discrimination in employment. Section 2 of the 1991 Act provides:

> The Congress finds that—
> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections and; (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

As this Court has long made clear, Title VII is to be construed liberally to further its goals of eradicating discrimination in the workplace and making whole the victims of discrimination. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, 228, 233 n.20 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). It was against the backdrop of this judicial precedent and the diminished effectiveness of the civil rights laws that Congress enacted the 1991 Act.

If the Court determines that the 1991 Act should not be applied to pending cases, victims of unlawful discrimination who succeed in proving unlawful conduct on the part of an employer will be deprived of the remedy Congress has determined is necessary to make victims of discrimination whole for their injuries. Even worse, victims of discrimination who, prior to this Court's decision in *Patterson*, chose to pursue their claims under 42 U.S.C. § 1981, rather than under Title VII, will find themselves with no remedy at all.

B. The Failure to Apply the 1991 Act To Pending Cases Will Leave Many Victims of Discrimination Without A Remedy

Prior to this Court's decision in *Patterson*, individuals who suffered discrimination on the basis of race in connection with an employment decision believed that they could choose between pursuing their claims under Title VII and pursuing their claims under 42 U.S.C. § 1981. If an individual chose the former, he or she would have had to comply with the administrative prerequisites of Title VII by filing a charge of discrimination with the EEOC within 180 (or 300) days of the challenged employment decision. 42 U.S.C. § 2000e-5(e). He or she then would have had to wait 180 days from the date on which the charge was filed to request that the EEOC issue a notice of right to sue. 42 U.S.C. § 2000e-5(f). Based on the pre-*Patterson* assumption that all claims of race discrimination in employment were actionable under 42 U.S.C. § 1981, many individuals chose simply to pursue their claims under 42 U.S.C. § 1981, either because they did not believe their claims could be resolved through the EEOC, or because they wished to recover compensatory damages previously unavailable under Title VII, or both. For those individuals who intended to pursue their claims through litigation, this choice not only implemented their individual preferences, but it also avoided the needless expenditure of EEOC resources, preserving those resources for those individuals who wished to attempt to resolve their claims administratively.

While the decision not to file a charge of discrimination with the EEOC meant foregoing their claims under Title VII, prior to *Patterson*, victims of race discrimination had no reason to worry about foregoing such claims, since a remedy was widely understood to be available under 42 U.S.C. § 1981. Unfortunately for those individuals who forbore pursuing their Title VII claims in reliance on that understanding and had actions pending at the time that *Patterson* was decided, that decision was applied retroactively, thereby not only depriving them of

the remedies available under 42 U.S.C. § 1981, but actually depriving them of *any* remedy whatsoever. These individuals will find themselves without any remedy for the unlawful discrimination to which they were subjected. The application of the 1991 Act to pending cases is necessary in order to enable individuals in these circumstances to vindicate their federal statutory rights.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. ____, 117 L. Ed. 2d 208, 218 (1992), the Court reiterated the general rule, derived from the English common law, that "all appropriate relief is available in an action brought to vindicate a federal right." While *Franklin* involved a federal statutory right as to which a private right of action was implied and, as to which, therefore, "Congress [had] given no indication of its purpose with respect to remedies," *id.*, the analysis set forth there is instructive. This analysis demonstrates the appropriateness of making the remedies set forth in the 1991 Act available to individuals who prevail in discrimination cases pending when the Act became law.

Franklin involved a claim by a high school student under Title IX of the Education Amendments of 1970, 20 U.S.C. §§ 1681–1688 ("Title IX"), challenging acts of sexual harassment committed by a teacher at the school. 503 U.S. at ___, 117 L. Ed. 2d at 215. Addressing the inadequacy of the traditional equitable remedies, including backpay, for a victim of sexual harassment who has not suffered a loss of wages, the Court held that monetary damages were available in order to avoid leaving such a victim "remediless." 503 U.S. at ___, 117 L. Ed. 2d at 223-24. The Court held,

> [I]n this case the equitable remedies [backpay and prospective relief] suggested by respondent and the Federal Government are clearly inadequate. Backpay does nothing for petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill—the person she claims subjected her to sexual harass-

ment—no longer teaches at the school and she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all.

Franklin, 503 U.S. at ___, 117 L. Ed. 2d at 223. This analysis should guide the Court's decision with respect to the remedies that will be made available to victims of discrimination whose claims were pending when the Act was passed. If the Court holds that the Act does not apply to pending cases, many proven victims of unlawful discrimination will be left with inadequate remedies, and many others will be left "remediless."

C. Victims of Discrimination in Pending Cases Who Have Proven their Entitlement to Relief Under Title VII are Entitled to the Remedies Congress Made Available Through the 1991 Act

Plaintiffs in pending cases who succeed in proving unlawful discrimination in the terms and conditions of their employment should receive the benefit of all the remedies provided by Congress to make whole victims of discrimination. In analyzing the equitable powers of the courts to fashion a remedy under Title VII, this Court has stressed the remedial purposes of Title VII, and noted,

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Albemarle Paper Co. v. Moody, 422 U.S. at 419 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). The Court has stated that,

> Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Albemarle Paper Co. v. Moody, 422 U.S. at 419 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The Court's reasoning with regard to the scope of a court's equitable powers to effect the remedial purposes of Title VII explains why the remedies provided by Congress to "eliminate the discriminatory effects of the past" should not be withheld from individuals whose cases were pending at the time the 1991 Act was passed.

The goals of the federal laws prohibiting discrimination in employment, as recognized by this Court and as reiterated by Congress in Section 2 of the 1991 Act, should not be hindered by a reading of the Act that requires the cases pending at the time of its enactment be decided under the law that the 1991 Act was enacted to replace. In light of the principles requiring the liberal construction of civil rights laws in order to further their goals of eliminating unlawful discrimination, the Act should be applied to cases pending at the time of its enactment.

D. Employers Will Not Be Prejudiced Nor Will Manifest Injustice Result From Application of the 1991 Act to Pending Cases

In many of the cases addressing the applicability of the 1991 Act to pending cases, the issue turned on the application of the principles of law articulated by this Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). For the reasons set forth in the briefs of petitioners and other amici, the *Bradley* decision should be applied in these cases. While those arguments will not be repeated here, two policy considerations should be emphasized.

First, the 1991 Act does not grant plaintiffs *additional* substantive rights; rather, its provisions simply augment the procedures by which plaintiffs may vindicate pre-existing rights. *See Denver and Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967) (holding that an act that did not change "substantive law" but only

affected "procedure" would be applied to cases pending when the act was enacted because " 'no one has a vested right to any given procedure' (citation omitted)"). This is particularly true with respect to the provisions of the 1991 Act allowing the right to a jury trial and compensatory and punitive damages. *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1177 (S.D.N.Y. 1991) (Carter, J.) ("The jury trial and damages provisions of the [1991 Act] at issue here do not grant plaintiffs additional substantive rights, but rather are more aptly described as augmenting the procedures by which plaintiffs may vindicate their pre-existing substantive rights."); *Wisdom v. Intrepid Sea-Air-Space Museum*, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424 * 21-22 (S.D.N.Y. 1992) (Patterson, J.) (appeal pending); *Jackson v. Bankers Trust Co.*, No. 88 Civ. 4786, 1992 U.S. Dist. LEXIS 6290 * 18 (S.D.N.Y. 1992) (Martin, J.); *Croce v. V.I.P. Real Estate*, 786 F. Supp. 1141, 1148 (E.D.N.Y. 1992) (Spatt, J.) (rejecting employer's argument that it had "a matured or unconditional right to be limited in exposure to only certain types of damages that flow from proscribed conduct"). This is also true with respect to the Section 101 of the 1991 Act, which reversed the limits on the scope of 42 U.S.C. § 1981 created by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), since conduct that is unlawful under Section 101 of the Act is already unlawful under Title VII. By permitting victims of race discrimination in employment to seek relief under 42 U.S.C. § 1981, the 1991 Act simply provides such victims with an alternative to Title VII and with remedies not previously available under Title VII.

Second, application of the 1991 Act to pending cases would *not* alter any of the existing rights of employers, for under existing law employers did not have any "right" to a bench trial or to be free from liability for punitive or compensatory damages. *Wisdom v. Intrepid Sea-Air-Space Museum*, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424 at * 22 ("Defendant never had a vested or unconditional right to violate federal anti-discrimination laws."); *Jackson v. Bankers Trust Co.*, 88 Civ.

4786, U.S. Dist. LEXIS 6290 at ** 18-19 ("it cannot be said that requiring the defendant to submit to a jury trial and subject itself to expert fees and punitive damages alters any of defendant's existing rights"); *Croce v. V.I.P. Real Estate*, 786 F. Supp. at 1148 ("The prospect of a defendant facing a jury trial in lieu of a bench trial, or potential compensatory damages where none previously existed, simply does not impact on 'existing rights'."). *See also EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988) ("Prospective-only application of the Pregnancy Discrimination Act would leave some of the Act's intended beneficiaries without remedy, while retroactive application would neither injure innocent third parties nor be inequitable to defendants . . . .").

While some courts have held that the availability of new remedies for conduct that has been unlawful at least since the enactment of Title VII implicates the existing rights of employers, *e.g.*, *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 229 (7th Cir. 1992), this reasoning should be rejected, for it translates into a suggestion that an employer might *not* have discriminated had it known that it would be subject to a jury trial and compensatory and punitive damages—that employers might have acted differently had they known that the "cost" of discrimination would include not just backpay but also compensatory and punitive damages. Discrimination in employment has been absolutely prohibited by Federal law since 1964, however, and employers should not be permitted to put a price on discrimination. This Court should reject the view that employers have a vested right to discriminate under a "cost-benefit analysis." *Jackson v. Bankers Trust Co.* No. 88 Civ. 4786, 1992 U.S. Dist. LEXIS 6290 at * 20 (S.D.N.Y. 1992) (Martin, J.) ("the Court will not sanction any stance that employers have a right to discriminate under a cost-benefit analysis").

Significantly, other civil rights statutes have been held to be applicable to cases pending at the time of their enactment. *See, e.g.*, *United States v. Alabama*, 362 U.S. 602 (1960) (Civil

Rights Act of 1960); *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (amendment to Fair Housing Act removing cap on punitive damages); *United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984) (amendments to Voting Rights Act); *Adams v. Brinegar*, 521 F.2d 129, 130 (7th Cir. 1975) (1972 amendments to Title VII); *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974) (same). Likewise, outside of the civil rights area, courts have also applied statutory changes to pending cases. *See, e.g., Kirkbride v. Continental Casualty Co.*, 933 F.2d 729 (9th Cir. 1991) (savings and loan); *FDIC v. 232, Inc.*, 920 F.2d 815 (11th Cir. 1991) (same); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (environmental); *United States v. O'Connell*, 890 F.2d 563 (1st Cir. 1989) (False Claims Act); *United States v. Pani*, 717 F. Supp. 1013, 1017 (S.D.N.Y. 1989) (False Claims Act). *See also Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (Multiemployer Pension Plan Amendments Act of 1980). There is simply no reason to distinguish the 1991 Act from other civil rights statutes or from other statutes such as the False Claims Act or the environmental laws or the savings and loan statutes.

Ultimately, the key in determining whether a statute should be applied to pending cases is whether "manifest injustice" would result. *Bradley*, 416 U.S. at 711; *see FDIC v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992) ("Any tension between [*Bowen* and *Bradley*] is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights."). No vested rights would be disrupted by the application of the 1991 Act to pending cases. On the other hand, "manifest injustice" will surely result if victims of employment discrimination—who have been subjected to unfair, adverse treatment in the terms of their employment simply because of their sex or race—are left with remedies that Congress has acknowledged are wholly inadequate, or, if they are left with no remedy at all.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the briefs of petitioners and other amici in support of petitioners, the decisions of the Fifth and Sixth Circuits should be reversed.

Dated: New York, New York
April 30, 1993

Respectfully Submitted,

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APPENDIX

STATEMENTS OF AMICI CURIAE

The National Asian Pacific American Legal Consortium, Inc. ("NAPALC") was created in 1992 to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities through collaborative efforts and the formation of a national legal structure that pursues litigation, advocacy, education, and public policy development. NAPALC is comprised of three organizations dedicated to the protection of civil rights of Asian and Pacific Islanders: the Asian American Legal Defense and Education Fund ("AALDEF"), the Asian Law Caucus, Inc. ("ALC"), and Asian Pacific American Legal Center of Southern California ("APALC").

AALDEF is a not-for-profit civil rights organization that addresses critical issues facing Asian Americans through community education, advocacy and litigation. AALDEF's program priorities include the elimination of anti-Asian violence, immigrant rights, voting rights, employment and labor rights, and redress for Japanese Americans incarcerated in camps in the United States during World War II.

ALC is a non-profit, public interest legal organization whose mission is to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities. Since 1972, the ALC has provided free or low-cost multilingual legal services and community education in the areas of immigration, housing, employment and labor, and civil rights.

APALC is a non-profit legal organization dedicated to serving the Asian and Pacific Islander communities through direct legal services, community education, leadership development, and advocacy. Founded in 1983, APALC provides multilingual, culturally sensitive legal and education services, with programs focusing on immigration, family law, language

rights, inter-ethnic relations, dispute resolution, and civil rights advocacy.

The National Asian Pacific American Bar Association ("NAPABA") is a nationwide, non-profit, non-partisan organization of Asian Pacific American attorneys. Founded in 1989, NAPABA has over 3,000 members and is dedicated to serving the needs of Asian Pacific American attorneys and their communities. NAPABA was involved in efforts leading to the passage of the 1991 Act.

The Asian Pacific American Labor Alliance, AFL-CIO ("APALA"), is non-profit labor organization founded in 1992 to, among other things: (1) defend and advocate for the civil and human rights of Asian Pacific Americans, immigrants and all people of color; and (2) provide a vehicle within our society for the concerns of all Asian Pacific American workers. APALA is the first national Asian Pacific American labor organization in American history.

The Chinese American Citizens Alliance ("CACA") is a national civil rights organization established since 1895 dedicated to the promotion and protection of equal rights for all Chinese Americans. It is membership supported and conducts legislative advocacy, youth development, and community awareness and participation activities on national, state and local levels.

The Organization of Chinese Americans, Inc. ("OCA") is a non-profit, non-partisan advocacy organization that was founded in 1973. As one of the nation's oldest Asian American civil rights organization, OCA seeks to secure social justice, equal opportunity, and equal treatment of Chinese Americans and Asian Americans; and to eliminate prejudices and ignorance about Chinese Americans and Asian Americans.

Supreme Court, U.S.
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JUN 03 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

BARBARA LANDGRAF,
Petitioner,
v.

USI FILM PRODUCTS, BOSAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,
v.

BROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR MIDWEST MOTOR EXPRESS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
Petitioner,

v.

USI FILM PRODUCTS, BONAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. 92-938

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR MIDWEST MOTOR EXPRESS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, ND, operating in nine states. Midwest's interest stems from likely legislation pending in Congress that would create another retroactive application problem identical to the one under the Civil Rights Act of 1991 now before this Court. Enactment of such legislation without a clear-cut *prospective* effective date would expose Midwest to serious threat of injury. Therefore, *amicus* seeks resolution by this Court of the apparently conflicting precedents on retroactive application of federal civil legislation.

Since August 12, 1991, Midwest has been engaged in a labor dispute with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters"), within the meaning of the Norris-LaGuardia Act (29 U.S.C. § 111(c)), and the National Labor Relations Act ("NLRA") (29 U.S.C. § 152(9)), as applied to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") (29 U.S.C. § 1398).[1] Nevertheless, not unlike the instant appeals under the Civil Rights Act of 1991, a proposed amendment to the NLRA threatens to turn Midwest's past legal actions into illegal ones—by retroactive application of a new law.

Legislation has been introduced in Congress to amend the NLRA (H.R. 5 and S. 55) which contains no effective date concerning when an employer may be prohibited from hiring permanent replacement workers during economic (wage and benefit) strikes. The relevant identical language of H.R. 5 and S. 55 is excerpted and attached as Appendix A. Consequently, if that legislation passes as currently drafted,[2] and if this Court now fails to resolve the apparent conflict between *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), Midwest expects that controversy and confusion similar to that engendered by the retroactive application of the Civil Rights Act of 1991 will occur. Such confusion is likely to result in serious adverse harm to Midwest's business and could subject it to unfair labor practice charges and/or costly state litigation. *See infra* at 13-17. The mere prospect of these occurrences is jeopardizing Midwest's ability to remain in business.

Accordingly, *amicus* has a vital interest in the resolution of the issues raised in this case. *Amicus* believes it will bring insights and information beyond what is presented by Petitioners and Respondents, which will be useful to the Court in deciding the issues presented.[3]

STATEMENT

These cases involve contradictory principles governing the prospective application of civil laws, which conflict this Court so far has been reluctant to resolve. Although the principle of prospectivity dates to the Greeks and Romans,[4] it has not always been followed by this Court.

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[1] The Teamsters struck Midwest on August 12, 1991, after negotiations over a new contract reached an impasse. Following commencement of the strike, the parties resumed bargaining with the assistance of a federal mediator, which bargaining has continued to the date of this brief without settlement. During the course of this labor dispute, Midwest has continued to operate only by hiring permanent replacements as it is permitted to do under current federal law.

[2] H.R. 5 and S. 55 were introduced in the Senate and the House of Representatives in January 1993. H.R. 5, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. H82, (daily ed. Jan. 5, 1993); S. 55, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. S191, (daily ed. Jan. 21, 1993). House and Senate floor action is eminent, and the Clinton Administration has endorsed the legislation as drafted. *Fairness in the Workplace: Restoring the Right to Strike: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103rd Cong., 1st Sess. (March 30, 1993) (statement of Robert B. Reich, Secretary of Labor).

[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of Court.

[4] As begins the seminal work on the rule against retroactivity: "The bias against retroactive laws is an ancient one." Smead,

At the heart of the dispute is this Court's holding that a court is to apply the law in effect at the time it makes its decision, unless doing so would result in "manifest injustice" or there is statutory direction (or legislative history) to the contrary. *Bradley*, 416 U.S. at 711. On the other hand, this Court more recently reaffirmed that "[R]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have effect unless their language requires this result." *Bowen*, 488 U.S. at 208.

There is a compelling reason for this Court to clarify its position and to adopt a bright-line, common-sense ruling based on *Bowen*. As Justice Scalia urged in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring), this Court should overrule *Bradley* and reaffirm the clear intent rule, since retroactive application is "never sought (or defended against) except as a means of 'affecting substantial rights and liabilities,'" and even procedural changes applied retroactively alter such rights. *Id.* at 1585. Thus, this Court should heed Justice Scalia's warning that "manifest injustice" is "just a surrogate for policy preferences" and that justice can mean "whatever other policy motivation might make one favor a particular result." *Id.* at 1587.

Failure to resolve this conflict will lead to continued examples of congressional recklessness, as demonstrated by the instant cases under the Civil Rights Act of 1991.[5] Midwest contends that the same result will occur in

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The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776-85 (1936).

[5] Only controversy, confusion, and expensive and protracted litigation has resulted when Congress deliberately leaves the effective date issue unresolved, as it did in the Civil Rights Act of 1991. As of mid-1992, 49 federal courts had ruled against retroactivity and 35 had ruled in favor of it. *See* Marcus, *A Percolating Legal Dispute on Civil Rights*, The Washington Post, April 17, 1992, at A21.

federal striker replacement and other legislation, unless the cardinal rule upheld in *Bowen* is reaffirmed.

SUMMARY OF ARGUMENT

Respondents ask this Court to affirm the decisions by the Fifth and Sixth Circuits that the Civil Rights Act of 1991 does not apply retroactively. In support, Midwest submits that the judicial chaos surrounding the retroactive application of legislation is the result of a dramatic departure from the historical rule against retroactivity.

Whether *Bradley* and *Bowen* can co-exist on a highly theoretical basis is, at best, debatable. *See infra* note 10 and accompanying text. In practice, however, clarifying the existing confusion necessarily depends on rejecting the irreconcilable precept which *Bradley* has been held to support that it is *not* unjust, in most cases, to apply new civil legislation retroactively.

The Supreme Court must find *Bradley* is applied wrongly as a "presumption" in favor of retroactivity whenever a new liability altering the position of private litigants and parties is involved, whether substantive or procedural rights are implicated. *See* Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason Univ. L. Rev. 231, 239-40 (Winter 1990). To this extent, the Supreme Court should overrule *Bradley* and reaffirm the long-standing rule of statutory construction that federal civil legislation only applies prospectively, unless there is a clear legislative intent to the contrary. Ambiguity—either intentional or unintentional—must be resolved in favor of the prospective application of legislation.

Moreover, Petitioners' interpretation of *Bradley* represents a blatant departure from the fundamental principles of fairness inherent in the clear intent rule upheld in *Bowen*. Accordingly, Petitioners' analysis stands wholly outside of the implicit constitutional and relevant policy factors which this Court must weigh in deciding these

cases. Under Petitioners' view, judicial review, Congress' role, and fairness each is undermined.

First, Petitioners erroneously assume that Respondents have acted wrongly in order to argue that Respondents have no "vested right to do wrong." *Rivers v. Roadway,* Pet. Brf. at 29; *Landgraf v. USI Film Products,* Pet. Brf. at 31. Second, Petitioners unpersuasively argue that the plain meaning of the Civil Rights Act of 1991 demonstrates a clear congressional intent to apply the law retroactively. Third, Petitioners move beyond the pale and assert that, under *Bradley,* any law (whether procedural or substantive) must be presumed retroactive based upon whatever label, political spin or policy preference the prevailing members of Congress place on the law, regardless of its effect on private parties or "what the original statute actually meant." *Rivers v. Roadway,* Pet. Brf. at 38. In Petitioners' view, if Congress labels a statute remedial or restorative, there is no room for judicial scrutiny.[6] *Landgraf v. USI Film Products,* Pet. Brf. at 29-33; *Rivers v. Roadway,* Pet. Brf. at 35-39. This Court must reject each of these specious arguments.

Rather than merely a judicial premption useful in interpreting ambiguous legislation, *Bowen* moreover, represents the cardinal rule of statutory construction in determining the retroactive application of legislation. By clarifying *Bowen* as such, this Court will preserve the appropriate burdens and roles of the legislature and the judiciary, including the historical and proper role of judicial review as a check on the power of the legislature unfairly to render laws retroactive.

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[6] Ironically, the one type of law historically not forbidden by the American principle of prospectivity was the "curative" law *validating* past acts that otherwise would have been void. But even curative laws that impaired vested rights or otherwise worked an injustice to parties were condemned by the American principle. *See* Smead at 786, n.36.

ARGUMENT

I. THE PRINCIPLE UPHELD IN BOWEN REPRESENTS THE CARDINAL RULE OF STATUTORY CONSTRUCTION GOVERNING THE RETROACTIVE APPLICATION OF FEDERAL CIVIL LEGISLATION

As Justice Scalia's concurring opinion in *Bonjorno* reveals, the principle that laws and customs should apply only to future transactions unless expressly stated that they apply either to past conduct or to pending transactions dates to the Greeks and Roman law. *Bonjorno*, 110 S. Ct. at *1586; Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374 (8th Cir. 1992). The principle, originally one of "natural law" which became a legal maxim under English law, was applied as a rule of statutory construction, and so found its way into American law.[7] In the United States, however, largely as a result of judicial review, this rule of statutory construction was combined with the concept of "vested rights" and "justice" to become a part of the concept of justice and a limitation on legislative power.[8] *See* Smead at 776-85.

Thus, the American principle of prospectivity has operated to protect vested rights by invalidating or narrowing the application of statutes that might have applied retrospectively. These included statutes that expressly

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[7] As in England, retroactive American laws were held to be oppressive and unjust, and it was maintained that the essence of law was that it be a rule for the future. Smead at 780, n. 21.

[8] In addition to being a rule of statutory construction in American law, the American courts added a judicial limitation on the constitutional ability of a legislative body to alter pre-enactment rights and conduct. Judicial scrutiny is an important component of the American constitutional system which controls legislative behavior. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). *See also* DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered,* 10 Ohio Northern L. Rev. 253 (1983).

were enacted to take effect from a time prior to their passage, as well as statutes that were to operate from the time of their passage, but affected vested rights and past transactions.[9] *See* Smead at 781-787, n.35. The fundamental notion has been and should be that, in most cases, it is unjust to apply new civil legislation retrospectively.

The rule against retroactivity thus embodies American constitutional notions of fairness and due process. Today, these factors must be considered by Congress and the courts in determining the validity of civil legislation which Congress *explicitly* makes retroactive. *See, e.g., Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984) (rejecting a Fifth Amendment due process challenge to a federal statute that retroactively imposed liability on employers who withdrew from multiemployer pension plans); *Turner Elkhorn*, 428 U.S. 1.[10] There-

[9] The prohibition included retrospective laws as defined by Mr. Justice Story in *Society for the Propagation of the Gospel in Foreign Parts v. Wheeler*, (1814) 2 Gall. C.C. 105:

> . . . . Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. . . .

[10] The Supreme Court has found the rational basis standard to be equivalent to the standard applied in *Welch v. Henry*, 305 U.S. 134, 147 (1938), where the Court held that a retroactive tax was constitutional unless its application was so "harsh and oppressive" as to violate due process. *R.A. Gray*, 467 U.S. at 733. This standard requires that there be a rational connection between the legislation's purpose and its retroactive effect. It is consistent with the rule against the retroactive application of legislation where Congressional intent is not explicit or clear. In the latter case, a statute need not be invalidated, but simply applied prospectively.

Arguably, the *Bradley* presumption in favor of retroactivity absent "manifest injustice" arose from cases in which retroactivity was explicit or clearly intended but "injustice" resulted. *See Bonjorno*, 110 S. Ct. at 1584. Theoretically, in this very limited context, *Bradley* remains viable. *See also Fray*, 960 F.2d at 1374 (*Bradley* did not "silently sweep away the traditional principle").

fore, when Congress makes a statute expressly retroactive, presumably it has reviewed these considerations and has resolved the inherent tensions involving fundamental fairness.

Accordingly, it is incongruous to suggest that legislation *not* explicitly made retroactive should be presumed to be retroactive, and then reviewed perfunctorily based upon a standard (such as Petitioners' conclusory remedial scheme), that ignores the fundamental issue of fairness which is the cornerstone of the historical rule of statutory construction against retroactivity. *See* DeMars at 264-272 (because the vested rights—remedial scheme approach utilizes analytically conclusive terms, it does not lead a court to consider the question of fairness which is also basic to the issue of statutory retrospectivity).

In particular, as with the Civil Rights Act of 1991, where Congress considered and rejected explicit retroactive application *and* failed to reach a consensus on its intent, after reviewing the requisite constitutional considerations, no finding of retroactivity is justified or should be compelled. *See infra* at 10-12.

Therefore, Midwest submits that the rule reiterated in *Bowen* is not only that prospectively must be upheld in the absence of clear intent, but further, that prospectivity must govern in determining clear intent when retroactivity is not explicit. Thus, to the extent that *Bradley* establishes a presumption in favor of retroactivity in the absence of clear intent or in determining clear intent, *Bradley* is wrong and should be overruled.

Accordingly, Midwest urges this Court to find that the cardinal rule of statutory construction in determining the retroactive application of federal civil legislation is the principle (and not merely the "presumption") that legislation must be applied prospectively, unless Congress specifically provides to the contrary. *See* Smead at 781 n.22; *U.S. v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1928) ("statutes are not to be given retroactive

effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears"). *But see Luddington v. Indiana Bell Telephone*, 966 F.2d 225, 228 (7th Cir. 1992), *petition for cert. pending*, No. 92-977 (*dictum*) (prospectivity "is resolved, but not all the way" because we are "speaking only of a presumption" against retroactivity). Only in concert with this paramount rule, can ancillary rules of construction utilized by the courts to determine statutory meaning and legislative intent (i.e., plain meaning) effectively operate without injury to the historical notions of fairness and justice upon which the principle is based.

II. BOWEN PRECLUDES THE RETROACTIVE APPLICATION OF NEW FEDERAL CIVIL LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHERE NO CONGRESSIONAL INTENT IS CLEAR

The express retroactive provisions of the Civil Rights Act of 1990 stirred much debate and disagreement as Congress grappled with concerns of fairness and constitutionality.[11] President Bush vetoed the 1990 act,[12] and Congress failed to override the veto. 136 Cong. Rec. S16,589 (daily ed. Oct. 22, 1990). In 1991, the bill's sponsors dropped the express retroactive provisions in order to gain acceptance and, instead, inserted language providing that "the amendments made by this Act shall

[11] *See, e.g.*, H.R. 4000, The Civil Rights Act of 1990; *Joint Hearing: Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); Civil Rights Act of 1990: *Hearing Before the Senate Comm. on Labor and Human Resources on S. 2104*, 101st Cong., 1st Sess. (1989).

[12] President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632-34 (Oct. 22, 1990), *reprinted in* 136 Cong. Rec. S16,457, S16,458 (daily ed. Oct. 24, 1990).

take effect upon enactment."[13] § 402 (a), 105 Stat. 1099. Arguably, this language explicitly states that the Act applies prospectively. Alternatively, the inference of Congress' action is that prospectivity is intended. *See e.g., National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

Because of its contradictory legislative history, however, the 1991 provision leaves open whether the law applies retroactively to cases pending on the date of enactment or whether the law applies only prospectively to future cases.[14] Clearly, the Act was passed without agreement on the issue, and apparently various members of Congress hoped this Court would resolve the known conflicting legal authorities in *Bradley* and *Bowen* in their favor. Congress thereby intentionally left its meaning unresolved. Thus, Petitioners' argument that the plain meaning of the Civil Rights Act of 1991 compels retroactivity fails. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372-1373 (5th Cir. 1992).

In *Bonjorno*, the Supreme Court simply reaffirmed that "where the congressional intent is clear, it governs." *Bonjorno*, 110 S. Ct. at 1577. But enactment of an ambiguous statute such as the Civil Rights Act of 1991,

[13] On November 21, 1991, President Bush signed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). In addition to reversing several Supreme Court decisions, the Act made substantial substantive and procedural changes including changes in adjudicator (jury) and damages (compensatory and punitive damages).

[14] *See* 137 Cong. Rec. S15,483, S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Danforth, the bill's Republican sponsor, arguing against retroactivity); 137 Cong. Rec. S15,472, S15,478 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Dole arguing against retroactivity); 137 Cong. Rec. S15,485 (daily ed. October 30, 1991) (interpretive memorandum by Sen. Kennedy, the bill's Democratic sponsor, arguing for retroactivity by characterizing the law as a "restoration of a prior rule"). *Notably, no sponsor characterized the legislation as merely procedural or remedial.*

or a *silent* statute such as the proposed federal striker replacement legislation, can defy any meaningful attempt to discern congressional intent. Under these circumstances, the historical constitutional underpinnings of American law require that *Bowen* prevail as the cardinal rule of statutory construction, not merely as "presumption" to be utilized in deciding among competing policy considerations. In effect, reaffirming the *Bowen* clear intent rule would ensure that, in the future, Congress will deliberate and provide clear intent on the retroactive application of any legislation that contains potential constitutional and fairness concerns.[15] Therefore, because nothing in the Civil Rights Act of 1991, or its legislative history, expresses a clear congressional mandate requiring retroactive application, the statute must not apply to pending cases.[16]

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[15] While the clear intent rule does not require that Congress make explicit its intent to apply a statute retroactively, it does require that Congress make its intent clear. *Bonjorno*, 110 S. Ct. at 1577. Hence, the cardinal rule against retroactivity may be superseded only by express statutory language or by implication when the statute "requires" it, i.e., when limiting the statute to prospective application would render it completely ineffective by defeating its entire purpose. *See e.g., United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (in order to be effective, CERCLA had to reach past conduct).

[16] Not surprisingly, the large majority of circuit courts have applied the *Bowen* "presumption" against retroactivity finding no clear expression of legislative intent to the contrary. *See Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989); *Davis v. Omitowoju*, 833 F.2d 1155, 1170-1171 (3rd Cir. 1989); *Leland v. Federal Ins. Adm'n.*, 934 F.2d 524, 528-529 (4th Cir.), *cert. denied*, 112 S. Ct. 417 (1991); *Storey v. Shearson-American Exp.*, 928 F.2d 159, 161-162 (5th Cir. 1991); *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *DeVargas v. Mason and Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377, 1392 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 799 (1991); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 900 (D.C. Cir. 1992); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992); *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 918, 922-923 (Fed. Cir. 1990).

III. THE RETROACTIVE APPLICATION OF LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHICH CREATES NEW LIABILITIES AND DUTIES BEYOND RESTORATIVE LAW, RESULTS IN STAGGERING REAL WORLD CONSEQUENCES

The Civil Rights Act of 1991 significantly expands both 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 to include new causes of action as well as new classes of plaintiffs. The enhanced remedies for intentional discrimination under Title VII in effect create new liabilities for sexual harassment in situations that do not involve tangible job detriments, such as "hostile environment" cases in which the plaintiff suffered no specific adverse employment action that resulted in economic harm. Monetary damages were never available before in such cases under Section 1981 or Title VII. Rights under Section 1981 are extended to post-formation contractual relationships. In effect, conduct insufficient to impose *liability* on employers before the Act was passed, may now be enough to result in a finding of discrimination against those same employers. Coil and Weinstein, *Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act*, 18 Employee Relations Law Journal 5, 6 (1992); *see e.g., Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374-1375 (1922); *Luddington*, 966 F.2d at 229.

Nevertheless, Petitioners argue that the Civil Rights Act of 1991 affects only procedure or remedies, and thus should be applied retroactively.[17] In addition to precluding a meaningful analysis of fairness, a key problem with this approach is that the label applied to a particular

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[17] If Congress had, in fact, intended *only* to restore prior law or to provide remedial rights that did *not* create new liabilities, Midwest submits it could have written language to achieve that limited result. *See Johnson*, 965 F.2d 1363.

change may not reflect whether the change alters substantive rights or conduct. The label becomes a "policy" tool for proponents of retroactive legislation. *See Bonjorno*, 110 S. Ct. at 1585.

Petitioners also argue that, because one purpose of the Civil Rights Act of 1991 was Congress' intent to overturn recent Supreme Court decisions on discreet employment law issues, retroactivity must be presumed. *See Rivers v. Roadway*, Pet. Brf. at 35-39. While a few courts, grappling with the conflict between *Bradley* and *Bowen*, have held that retroactive application of a new law is appropriate where Congress clearly intended to overrule recent case law and restore the law to its former state, other courts reject this approach as too speculative. *See Mojica v. Gannett Co.*, 779 F. Supp. 94, 97 (N.D. Ill. 1991) (retroactive application of the Civil Rights Act of 1991 upheld in part on the basis that the Act was meant to "restore" prior law); *but see DeVargas*, 911 F.2d at 1387. By reaffrming *Bowen* as the cardiral rule of statutory construction against retroactivity, this Court would eliminate the expansive dangers inherent in Petitioners' approach. Only prospective application of a new law would be appropriate, absent a clear congressional intent to apply a statute retroactively in order to restore recent prior law.

The potential unfair application of likely federal striker replactment legislation to Midwest's ongoing labor dispute starkly demonstrates the absurdity of Petitioners' position. Under Petitioners' interpretation of *Bradley*, the mere conclusory characterization (albeit erroneous) of federal striker replacement legislation as "restorative" would result in the retroactive application of legislation to Midwest.[18]

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[18] Proponents of H.R. 5 and S. 55 are characterizing the legislation as "restorative law" designed to overturn the Supreme Court's decisions in *NLRB v. Mackay Radio and Telegraph Co.*,

This result could require the National Labor Relations Board ("NLRB") to find that Midwest retroactively committed an unfair labor practice by hiring some permanent replacements after August 12, 1991 under the newly amended law.[19] See Attachment A for proposed language of H.R. 5 and S. 55 adding 29 U.S.C. § 158(a)(6). Moreover, such a result could turn the current labor dispute on its head by converting the Teamsters strike against Midwest from an economic strike into an unfair

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304 U.S. 333 (1938), and *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989). *See* note 2 *supra*, at 3. The legislative history of the NLRA conclusively refutes this position and demonstrates that the changes sought by H.R. 5 and S. 55 would alter the long-standing legal right of an employer to permanently replace economic strikers affirmed under the NLRA. The legislative history of the Wagner Act of 1935 (the original NLRA) preserved the right of an employer to hire replacements, whether permanent or temporary. Although the Wagner Act did not address the issue directly, a U.S. Senate Education and Labor Committee memorandum regarding the Wagner bill states:

> [The bill] provides that the labor dispute shall be "current," and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis . . . . The broader definition of "employee" in [the bill] does not lead to the conclusion that no strike may be lost or that an employer may not hire new workers, temporary or permanent, at will.

See Senate Comm. on Education and Labor, *Comparison of S. 2926 and S. 1958*, 74th Cong., 1st Sess. 21-22 (1935), *reprinted in A Legislative History of the National Labor Relations Act*, 1935, pp. 1319, 1346 (1985 Reprint, U.S. Government Printing Office).

[19] Ironically, while the Board may not issue a complaint based upon conduct occurring more than six months before filing and service of the charge (29 U.S.C. § 160(b)), the six month limitations period does not begin to run until the party adversely affected receives actual or constructive notice of the unfair labor practice. *See Lehigh Metal Fabricators*, 267 NLRB 568, 114 LRRM 1064 (1983); *Plymouth Locomative Works*, 261 NLRB 595, 110 LRRM 1155 (1982); *Crown Cork & Seal Co.*, 255 NLRB 14, 107 LRRM 1195 (1981).

labor practice strike. *See NLRB v. Burkart Foam,* 848 F.2d 825 (7th Cir. 1988); *NLRB v. Jarm Enters,* 785 F.2d 195 (7th Cir. 1986); *NLRB v. Charles D. Bonanno Linen Serv.,* 782 F.2d 7 (1st Cir. 1986); *Vulcan-Hart Corp. v. NLRB,* 718 F.2d 269 (8th Cir. 1983). The most significant aspect of an unfair labor practice strike is that strikers are entitled to reinstatement to their former positions upon an unconditional offer to return to work. *Pecheur Lozenge Co.,* 98 NLRB 496, 29 LRRM 1367 (1952), *enforced as modified,* 209 F.2d 393, 33 LRRM 2324 (2nd Cir. 1953). In effect, the economic strikers would be entitled to reinstatement if the NLRB were to find that Midwest commited an unfair labor practice which had the effect of prolonging the economic strike (i.e., that hiring permanent replacements presumptively prolonged Midwest's strike). *See Vulcan-Hart Corp.,* 718 F.2d 269; *Gilberton Coal Co.,* 291 NLRB 344, 131 LRRM 1329 (1988), *enforced,* 888 F.2d 1381 (3rd Cir. 1989). These strikers would have to be reinstated even though Midwest hired permanent replacements. *See Mackay,* 304 U.S. 333.

Moreover, Midwest would be required to terminate its current permanent replacements, even though they were *legally* hired. *See NLRB v. Elco Manufacturing Co.,* 227 F.2d 675 (1st Cir. 1955), *cert. denied,* 350 U.S. 1007 (1956); *NLRB v. Remington Rand, Inc.,* 130 F.2d 919 (2nd Cir. 1942). Midwest's picture could become even more oppressive because the terminated permanent replacement workers could sue Midwest for breach of contract and misrepresentation in North Dakota state court upon their discharge to make room for reinstatement of the economic strikers. *See Belknap, Inc. v. Hale,* 463 U.S. 491 (1983).[20] The weight of such multiple

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[20] The Supreme Court of North Dakota has upheld similar breach of contract suits. *See Lambott v. United Tribes Educational Technical Center,* 361 N.W.2d 590 (1985).

litigation alone could force Midwest out of business. Indeed, the real world consequences to Midwest of applying federal striker replacement legislation retroactively under *Bradley* based upon mere labels could be staggering.

Therefore, it is in determining a clear congressional intent that judicial review and the principle of fairness embodied in the rule of statutory construction against retroactivity become imperative. Petitioners segregate this critical analysis entirely from the determination of the "plain meaning" and "clear intent" of the statute by misinterpreting *Bradley* to require the retroactive application of any new federal civil legislation which is labeled "procedural" or "restorative". As Midwest has shown, this argument is untenable.

CONCLUSION

Because of the conflicting principle in *Bradley* that retroactivity is *not* unjust and is presumed, the door is open for Congress to pass federal civil legislation (such as the Civil Rights Act of 1991 and the proposed federal striker replacement legislation), without resolving its applicability to current disputes. While such a state of confusion may enable Congress to pass controversial legislation, it improperly allows Congress to shift the burden of deciding the issue of retroactivity onto private litigants and the courts at an exorbitant cost.

Therefore, this Court should guide the lower courts and restore judicial order and economy, should encourage Congress to provide clear intent, and should preserve the important, long-standing origins and purpose of the cardinal rule of statutory construction against retroactivity. The Court would accomplish all of these objectives by reaffirming *Bowen* and overruling *Bradley*. Absent explicit retroactive language or clear congressional intent, legislation must apply only prospectively. This is the bright-line, common-sense rule needed to restore fundamental fairness to the concept of retroactivity.

Based upon the foregoing, Midwest submits that the decisions of the Court of Appeals for the Fifth Circuit in *Landgraf v. USI Film Products,* and of the Court of Appeals for the Sixth Circuit in *Rivers and Davison v. Roadway,* are correct in finding that the Civil Rights Act of 1991 applies prospectively, and should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPT OF SECTION 1 FROM H.R. 5 AND S. 55

* * * *

JANUARY 5, 1993

* * * *

A BILL

To amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PREVENTION OF DISCRIMINATION DURING AND AT THE CONCLUSION OF LABOR DSPUTES.

Section 8(a) of the National Labor Relations Act (29 U.S.C. 158(a)) is amended—

(1) by striking the period at the end of paragraph (5) and inserting "; or", and

(2) by adding at the end thereof the following new paragraph:

"(6) to promise, to threaten, or to take other action—

"(i) to hire a permanent replacement for an employee who—

"(A) at the commencement of a labor dispute was an employee of the employer

in a bargaining unit in which a labor organization—

"(I) was the certified or recognized exclusive representative, or

"(II) at least 30 days prior to the commencement of the dispute had filed a petition pursuant to section 9(c)(1) on the basis of written authorizations by a majority of the unit employees, and the Board has not completed the representation proceeding; and

"(B) in connection with that dispute has engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection through that labor organization; or

"(ii) to withhold or deny any other employment right or privilege to an employee, who meets the criteria of subparagraphs (A) and (B) of clause (i) and who is working for or has unconditionally offered to return to work for the employer, out of a preference for any other individual that is based on the fact that the individual is performing, has performed, or has indicated a willingness to perform bargaining unit work for the employer during the labor dispute."

* * * *

Supreme Court, U.S.
FILED
JUN 25 1993

Nos. 92-757 and 92-938

In the Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF, *Petitioner,*

v.

USI FILM PRODUCTS, ET AL., *Respondents.*

MAURICE RIVERS AND ROBERT C. DAVISON, *Petitioners,*

v.

ROADWAY EXPRESS, INC., *Respondent.*

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AND ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, applies retroactively to claims pending on or conduct occurring before the date of enactment.

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AND ASSOCIATION OF AMERICAN RAILROADS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE AMICI CURIAE

The American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 for-hire motor carriers, as well as private carriers, leasing companies, and trucking suppliers. Nationwide, the trucking industry employs approximately 7,800,000 men and women. ATA regularly advocates the trucking industry's common interests before this Court and other courts.[1]

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[1] The written consent of each of the parties to the filing of this brief has been filed with the Clerk.

The Association of American Railroads ("AAR"), a not-for-profit corporation, is a trade association of the nation's major railroads. AAR's members operate approximately 76 percent of line-haul mileage, produce approximately 91 percent of freight revenue, and employ approximately 90 percent of the railway work force in the United States, with nearly 225,000 employees. AAR represents its member railroads before courts, agencies and Congress in matters of common concern.

The issues at stake in this case are of direct concern to ATA and AAR. ATA and AAR, on behalf of the motor carrier and railroad industries, strongly support, and are deeply committed to, equality of employment opportunity for all persons and believe that discrimination in all forms should be eliminated from the workplace. ATA and AAR thus share the general goals of Congress in enacting the Civil Rights Act of 1991 to the extent that the new provisions will serve to reduce or eliminate future employment discrimination.

At the same time, however, the membership of ATA and AAR, as employers of many millions of workers, have a large stake in ensuring that the provisions of the new Act be applied fairly and with a minimum of disruption to cases arising prior to the Act. In the absence of congressional direction to apply the new Act retroactively, fair application requires that employers' legitimate reliance under the previously existing statutory scheme be recognized and that their potential liability and financial exposure for conduct pre-dating the Act not be increased through retroactive application of the Act to pre-Act conduct. Fair application also requires that trials commenced or concluded under the then-existing law not be reopened and relitigated based on retroactive application of the Act's new statutory requirements. For these reasons, ATA and AAR have a strong interest in seeing that the new Act is applied prospectively only to conduct occurring after its effective date.

STATEMENT

1. Petitioner Barbara Landgraf (No. 92-757) worked for respondent USI Film Products from September 1984 to January 1986. During that time she was subjected to "inappropriate verbal comments and physical contact" by a co-worker.

Pet. App. A-2. After she reported that harassment, the co-worker was given a written reprimand and assigned to a different department. At the same time, the company counseled Landgraf regarding problems she was having getting along with other co-workers. Two work days later, Landgraf quit her job, leaving behind a letter to her co-workers stating that "the stress that each one of you help to put on me, caused me to leave my job." *Id.* at A-3.

Landgraf brought this lawsuit on July 21, 1989, claiming that the harassment created a "hostile work environment" at USI and that she had been constructively discharged in violation of Title VII. Following a bench trial, the district court issued its decision on May 22, 1991, holding that Landgraf had not been constructively discharged because the harassment was not severe enough that a reasonable person would have felt compelled to resign. Pet. App. B-3. The court also concluded that "[t]he remedial measures instituted by [USI] alleviated the harassment" and that "Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers." *Id.* at B-2.

Landgraf appealed, arguing that the district court erred in holding that she had not been constructively discharged and that USI had acted reasonably to stop the harassment. On November 21, 1991 -- nearly six years after Landgraf left USI and six months after the district court ruled against her -- Congress enacted the Civil Rights Act of 1991. Landgraf argued that the new law, which for the first time provided a cause of action for compensatory and punitive damages under Title VII, should be applied retroactively to her claim. The court of appeals disagreed, holding that the Act was not to be applied retroactively and affirming the district court's judgment in all other respects. Pet. App. A-8 to A-10.

2. On September 26, 1986, petitioners Maurice Rivers and Robert Davison (No. 92-938) and a co-worker, James Harvis, were discharged from their employment with respondent Roadway Express, Inc., for refusing to attend a disciplinary hearing and for poor work records. They filed suit under 42 U.S.C. § 1981 and Title VII, claiming that their discharges were racially motivated and were also in retaliation for previ-

ously filing a grievance against Roadway. Harvis's case was tried separately to a jury, which reached a verdict in favor of Roadway. The district court dismissed Rivers' and Davison's Section 1981 claims in light of this Court's holding in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), that Section 1981 does not provide a cause of action for discriminatory discharge or breach of contract. Following a bench trial, on October 18, 1990, the district court entered judgment in favor of Roadway on the Title VII claims, holding that Rivers and Davison had failed to prove that Roadway's actions were racially motivated. Pet. App. 2a-4a.

Rivers and Davison appealed the dismissal of their Section 1981 claims. Once again, the 1991 Act came into the picture during the pendency of the appeal, five years after petitioners' discharge and over a year after the district court's judgment against them. The Act expanded the coverage of Section 1981 to provide a cause of action for discriminatory discharge, and petitioners argued that it should be applied retroactively to revive their claims. Although the court of appeals rejected that argument, it held that even before the 1991 Act, Section 1981 provided a cause of action for petitioners' retaliatory discharge claim. The court of appeals therefore reversed the district court and remanded for further proceedings on the Section 1981 retaliation claim. Pet. App. 14a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented is whether the Civil Rights Act of 1991 should be applied retroactively to conduct occurring before the date of enactment. Unless the Court holds that Congress expressly made the law nonretroactive -- an approach that has strong support in the legislative history -- the issue is how courts should decide whether legislation should be given retroactive effect in the absence of any express direction by Congress. In deciding this issue, the Court is not on unfamiliar ground. For over 200 years this Court has recognized that retrospective laws are unjust and that Congress does not generally make its laws retroactive. In light of that recognition, the Court has followed the rule that a law should not be regarded as retroactive unless it expressly provides for retroactive application or is incapable of any other interpretation.

The Court has applied the presumption against retroactivity to "remedial" statutes, and has certainly not made the unmanageable distinction petitioners and their *amici* attempt to draw between "substantive," "procedural," and "remedial" laws. The critical inquiry is not what label to attach to a particular statute, but whether applying the new law to the pending case would change the consequences of past conduct.

It is arguable that the Court deviated from the presumption against retroactivity on two occasions, *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), and *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). The perception that *Thorpe* and *Bradley* applied a presumption *in favor of* retroactivity has caused great and needless confusion in the lower courts and among litigants. The Court should end that confusion and confirm the continued vitality of the longstanding rule that a statute cannot be given retrospective effect absent an affirmative statement in the law -- passed by Congress and signed by the President -- that the law should be applied retroactively.

ARGUMENT

I. THE RULE THAT STATUTES NOT BE GIVEN RETROACTIVE EFFECT UNLESS CONGRESS EXPRESSLY PROVIDES FOR SUCH AN EFFECT HAS BEEN CONSISTENTLY APPLIED BY THIS COURT FOR NEARLY 200 YEARS AND IS BASED ON SOUND PUBLIC POLICIES.

For nearly 200 years, this Court strictly applied a rule of statutory construction that acts of Congress are not to be applied retroactively unless they expressly provide for retrospective application or are susceptible to no other reasonable construction. The Court restated the rule recently in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988):

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *E.g.*, *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164 (1944); *Miller* v. *United States*, 294 U.S. 435, 439 (1935);

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928).

American courts consistently applied this rule even before *Magnolia Petroleum*. See, *e.g.*, *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied"); *Dash* v. *Van Kleeck*, 7 Johns. 477, 502 (N.Y. 1811) (Kent, C.J.) ("A statute ought never to receive such a construction [of retroactive application] if it be susceptible of any other"). Even earlier, the strict presumption against retroactivity was a fixture of the English common law and can be traced to ancient Greek and Roman legal traditions. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775-780 (1935).

Some view two recent decisions of this Court as deviating from this ancient rule. In *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1968), the Court said that "an appellate court must apply the law in effect at the time." And in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 715 (1974), the Court purported to "reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Both *Thorpe* and *Bradley* based their conclusions on Chief Justice Marshall's opinion in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Petitioners and their supporting *amici* -- particularly the United States -- characterize the tension between *Bradley* and *Thorpe* on the one hand, and the traditional rule articulated in *Bowen* on the other hand, as "more apparent than real." U.S. Br. at 17. They regard the traditional rule as applying only to "substantive provisions" of new laws, and the *Bradley/Thorpe* rule as applying to "procedural and remedial provisions" of such laws. Their explanation is historically inaccurate, and the distinction they would draw is ill-advised and unworkable. *Bradley* and *Thorpe* can be reconciled with the traditional rule,

but not in the way petitioners suggest. Both of those cases can be viewed as purely prospective application of new laws. But there would be nothing prospective about applying the Civil Rights Act of 1991 in the way advocated by petitioners, and the policy concerns that for centuries have sustained the presumption against retroactivity remain as powerful today and apply fully to this case.

A. For Nearly 200 Years, This Court Has Consistently Applied The Presumption That New Statutes Are Not Retroactive.

The Court's opinion in *Schooner Peggy* gives no indication that it was departing from centuries of settled law, and it was not. By 1801 it was well established that while the legislature could give retrospective effect to civil laws, the courts would not construe laws to have retrospective effect unless the legislature expressly provided for such an effect:

> The [Roman] Digest showed that the Prince could make a law operate retrospectively if he made it expressly clear that such was his will, and the common law followed this interpretation of the rule. Thus, the principle in the English common law meant that the courts, in the exercise of their function of interpreting the law in the cases which came before them, viewed themselves as bound by the rule of construction that no law should be given an operation from a time prior to its enactment unless Parliament has expressly provided that it should have such an effect or unless the words of the Act could have no meaning except by application to this past time. Because a retroactive law was unjust the judges insisted that they would not assume that Parliament meant a statute in general terms to be applied retroactively.

Smead, 20 MINN. L. REV. at 778. When he wrote the Court's opinion in *Schooner Peggy*, Chief Justice Marshall was undoubtedly aware of this rule, which was regularly applied by the American and English courts. See, *e.g.*, *Osborne* v. *Huger*, 1 Bay 179, 198 (S.C. 1791); *Butler* v. *Boarman*, 1 H. & McH. 371, 382 (Md. 1770); *Gillmore* v. *Shooter*, 86 Eng. Rep. 1091, 2 Mod. Rep. 310 (1678).

Schooner Peggy recognized the presumption against retroactivity, but held that a new treaty was expressly retroactive. The case involved the condemnation of a French ship that had been captured by an American vessel in April 1800. The lower courts upheld the condemnation of the ship, but in 1801, while the case was pending in the Court, France and the United States entered into a treaty which provided that "[p]roperty captured, and not yet *definitively* condemned * * * shall be mutually restored." 5 U.S. (1 Cranch) at 107. The case required the Court to construe the terms of that treaty, and particularly to decide what it meant to be "definitively condemned". The Court held that the treaty was expressly retroactive, reasoning that "[o]n any other construction the word *definitive* would be rendered useless and inoperative." 5 U.S. (1 Cranch) at 109.

The meaning of the Court can be seen from the entire paragraph addressing the issue:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such 10a case the court must decide according to existing laws, and if it be necessary to set aside a judgment,

> rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

5 U.S. (1 Cranch) at 110. In sum, *Schooner Peggy* involved a straightforward construction of the 1801 treaty. The Court acknowledged the general rule against construing a statute to have retrospective effect, but the plain language of the treaty ("its manifest import") required such a construction.

The Court acknowledged the general rule "that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not." 5 U.S. (1 Cranch) at 110. More to the point, it emphasized that in "private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." *Ibid.* But because the treaty with France expressly applied to pending (but not yet "definitive") condemnation cases, the law must "receive a construction conforming to its manifest import." *Ibid.*

The Court's statement that if "a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied" must be taken in the context of the full passage. As Judge Newman has persuasively explained, "'obey[ing]' the intervening statute did not necessarily mean applying it to the pending case; instead the statute must be construed, and, if only private rights were involved, a retroactive construction was not favored." *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 746 F.2d 168, 172 (2d Cir. 1984). The longstanding rule -- recited by Chief Justice Marshall in his opinion -- that retroactive application of new laws to pending cases should be "struggle[d] hard against" is thus not inconsistent with his statement in the same paragraph that the new law be "obeyed."

That *Schooner Peggy* did not reverse the presumption against retroactive application of new laws is clearly seen from contemporaneous decisions. Justice Paterson's opinion in *United States* v. *Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) is instructive:

> Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and

> imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

In *Heth*, the Court held that a law limiting the commissions paid to customs collectors did not apply to goods imported before the effective date of the law.

Chief Judge Kent, in 1811, applied the rule and noted its ancient origins:

> A statute ought never to receive [a retrospective] construction, if it be susceptible of any other, and the statute before us can have a reasonable object and full operation without it. * * * It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. * * * It is, indeed, admitted [by Roman law], that the prince may enact a retrospective law, provided it be done *expressly*.

Dash v. *Van Kleeck*, 7 Johns. 477, 502, 503, 505 (N.Y. 1811) (emphasis in original). The case was a lawsuit against a sheriff who allowed a man held in prison for indebtedness to escape. A statute passed before the trial (but after the escape) would have given the sheriff an absolute defense, but the Court held that it would not be applied retroactively.

Justice Story stated the rule while sitting on circuit in 1814:

> It is a general rule, that statutes are to be construed to operate in futuro, unless from the language a retrospective effect be clearly intended. "Nova constitutio futuris formam imponere debet, et non preterites." Bract. lib. 4, fol. 228; 2 Inst. 292. And this maxim applies as well to remedial, as to other statutes. There is nothing in the wording of this Act, which points to a retrospective operation, and the whole intent may be satisfied by restraining it to future cases.

Prince v. *United States*, 19 F. Cas. 1331, 1332 (C.C.D. Mass. 1814). *Prince* involved the duties to be assessed upon goods captured from enemy ships. At the time of their capture, such goods were subject to the same duty as like goods brought into

the country through ordinary channels. While the case was pending, a new law reduced the duty on prize goods by one-third, but the court held that in the absence of express language to that effect, the new law was not retroactive.

This Court recognized the presumption against retroactive legislation throughout the 19th century and never regarded *Schooner Peggy* as stating a different rule.[2] See, *e.g.*, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899) ("the general rule is that statutes should be so construed as to give them only prospective operation"); *Chew Heong* v. *United States*, 112 U.S. 536, 559 (1884) (it is "the settled doctrine of this Court" that "words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied"); *United States* v. *Moore*, 95 U.S. 760, 762 (1877) ("A statute is never to be construed to have [retroactive] effect, if it can be reasonably avoided. The presumption, until rebutted, is the other way."); *Twenty Per Cent Cases*, 87 U.S. (20 Wall.) 179, 187 (1873); *Sohn* v. *Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873); *McEwen* v. *Den*, 65 U.S. (24 How.) 242, 244 (1860); *Carroll* v. *Carroll's Lessee*, 57 U.S. (16 How.) 275, 281 (1854); *Murray* v. *Gibson*, 56 U.S. (15 How.) 421, 423 (1853); *Ladiga* v. *Roland*, 43 U.S. (2 How.) 581, 589 (1844); *Reynolds* v. *M'Arthur*, 27 U.S. (2 Pet.) 417, 435 (1829) (Marshall, C.J.) ("[A retrospective] construction can never be admitted by the Court unless it be rendered indispensable by the language of the act.").[3]

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[2] It is noteworthy that in an 1854 case, *Schooner Peggy* was cited by an advocate before the Court for the proposition that "[s]tatutes are not to be construed to have a retrospective operation." *Carroll* v. *Carroll's Lessee*, 57 U.S. (16 How.) 275, 279 (1854). See also *United States* v. *Security Industrial Bank*, 459 U.S. 70, 80 (1982) (opinion for the Court citing *Schooner Peggy* for the rule against retroactive construction).

[3] See also *United States* v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) ("That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is

B. The Traditional Rule Is Based On Sound Public Policies.

The presumption that legislation is not retroactive unless the legislature expressly so provides is a bright-line rule that makes it relatively easy for courts to decide cases like this one, lets potential litigants determine the law without litigation, and makes it clear to legislators that if they intend to take the unusual step of making a law retroactive, they must clearly say so. But the virtues of the rule go far beyond those. The rule reflects a longstanding and intuitively correct belief that retroactive laws can be unfair and at the very least require special justification. The rule promotes finality in litigation. In addition, the rule accurately predicts legislative intent: relatively few laws are intended to have retrospective effect, so a presumption against retroactivity is more likely to further legislative intent than the contrary presumption. There is much to commend the presumption against retroactivity, and virtually nothing to commend a contrary rule.

"Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (1891). As this Court put it more recently, "[r]etroactive legislation presents problems of unfairness that

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a rule of general application"); *Shwab* v. *Doyle*, 258 U.S. 529, 534-535 (1922); *Cameron* v. *United States*, 231 U.S. 710, 720 (1914); *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 314 (1908); *Wallace* v. *Adams*, 204 U.S. 415, 421-422 (1907); *United States* v. *American Sugar Refining Co.*, 202 U.S. 563, 577 (1906); *White* v. *United States*, 191 U.S. 545, 552 (1903); *Southwestern Coal Co.* v. *McBride*, 185 U.S. 499, 503-504 (1902). State, lower federal, and English courts also consistently applied the rule. See, *e.g.*, *Baugher* v. *Nelson*, 9 Gill 299, 303 (Md. 1850); *Bedford* v. *Shilling*, 4 Serg. & Rawl. 401, 402-403 (Pa. 1818); *Somerset* v. *Dighton*, 12 Mass. 383, 385 (1815); *Witman* v. *Hapgood*, 10 Mass. 437, 439 (1813); *In re Richardson*, 20 F. Cas. 699, 702-703 (C.C.D. Mass. 1843) (Story, J.); *Blanchard* v. *Sprague*, 3 F. Cas. 648, 650 (C.C.D. Mass. 1839) (Story, J.); *Hitchcock* v. *Way*, 112 Eng. Rep. 360, 363-364 (1837).

are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992). The unfairness of retroactive laws was recognized by the Greeks and Romans (see Smead, 20 MINN. L. REV. at 775-776) and is reflected in the constitutions of several states. *E.g.*, N.H. CONST., Pt. 1, Art. 23 ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."). See also COLO. CONST., Art. II, § 11; GA. CONST., Art. I, § I, ¶ X; MO. CONST., Art. I § 13; MONT. CONST., Art. XIII, § 1, cl. 3; OHIO CONST., Art. II, § 28; TENN. CONST., Art. I, § 20; TEX. CONST., Art. I, § 16. Retroactive legislation is seen as contrary to "the rule of law" and akin to the practices of the most despotic rulers of concealing or changing the law to trap their enemies. Smead, 20 MINN. L. REV. at 776-780; 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *45; *Luddington* v. *Indiana Bell Telephone Co.*, 966 F.2d 225, 227-228 (7th Cir. 1992) (Posner, J.), *petition for cert. filed*, No. 92-377 (Dec. 3, 1992); *Dash* v. *Van Kleeck*, 7 Johns. at 503-504.

In addition to disrupting settled expectations and interfering with closed transactions, retroactive laws can destroy the finality of litigation and waste judicial resources. As explained by Judge Posner in refusing to apply the 1991 Act to pending cases, "[r]etroactive application across the board would produce massive dislocations in ongoing litigation and defeat substantial reliance interests of employers." *Luddington*, 966 F.2d at 229. Retroactivity effectively allows courts to alter the "rules of the game" after the trial already is over and the parties' respective positions are fixed in reliance on prior law. See *Litton Systems*, 746 F.2d at 171 ("[n]o party to an appeal should be held to a standard that permits consideration of an intervening statute only when issues affected by the statute are already on ap

peal").[4] Indeed, protecting the ability to plan one's affairs in accordance with existing law lies at the heart of this Court's retroactivity jurisprudence. *Bennett* v. *New Jersey*, 470 U.S. 632 (1985). Smead, 20 MINN. L. REV. at 777.

If retroactivity is the rule, cases correctly resolved will need to be re-tried. Trial losers will pursue weak appeals and keep cases alive as long as possible whenever legislation is being considered that could change the result. Similarly-situated individuals will have their claims resolved differently, with bonuses for those who appeal their cases (or keep their appeals alive longer) and those who bring lawsuits in the face of adverse law. *Litton*, 746 F.2d at 171 ("[s]uch a standard would require either anticipation of statutes not yet enacted or the assertion of frivolous grounds in appeals and cross-appeals in the hope that a new statute might affect their resolution favorably"). In short, the incentives created by retroactive laws (or the possibility of retroactive laws) are all wrong for the legal system, and are manifestly disruptive to individuals who need to put contentious lawsuits behind them and get on with their lives. See Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 427 (1982) ("[r]etroactive laws frustrate the central purpose of law by disrupting expectations and actions taken in reliance on them. This disruption is always costly and rarely defensible. . . . [R]etroactive laws, at least those that alter the legal status of a pre-enactment action or event, are very hard to justify").

Retroactive application of laws can also lead to highly artificial, fragmentary decisionmaking on appeal. Litigants decide what factual issues to pursue (or to contest) based on the

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[4] See also Hochman, *The Supreme Court And The Constitutionality Of Retroactive Legislation*, 73 HARV. L. REV. 692 (1964) ("[p]erhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences"); Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977) ("[a] retroactive law makes it difficult or impossible to act with knowledge of the applicable law. This explains why retroactive laws are generally objectionable: We feel that a person is morally entitled to know in advance what legal character and consequences his acts have").

legal consequences they believe those factual issues have at the time. Retroactive application of new laws may give legal consequence to factual findings that the parties did not seriously contest and that are not worthy of such consequences, and may require appellate courts to apply factual findings in a legal context that is totally divorced from that which gave rise to those findings in the first place.

Besides reflecting the proper hostility toward retroactive laws, the presumption that legislation is not retroactive has virtues of its own. As Justice Scalia put it, "[a] background rule of retroactivity is * * * patently contrary to probable legislative intent." *Kaiser Aluminum*, 494 U.S. at 856. Most statutes are *not* retroactive. Congress certainly knows how to make laws retroactive (see, *e.g.*, Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2236; Soldiers & Sailors Civil Relief Act of 1991, Pub. L. 102-12, 105 Stat. 34; Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978; Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789; Independent Safety Board Act Amendments of 1990, Pub. L. 101-641, 104 Stat. 4654; Inventions in Outer Space Act, Pub. L. 101-580, 104 Stat. 2863; Customs and Trade Act of 1990, 104 Stat. 629) yet it rarely does so. By our count, of the 429 substantive Acts of Congress passed during 1990 and 1991 (the years in which the Civil Rights Act was drafted), only the seven listed above were expressly retroactive.[5] In those years, a presumption against retroactivity would thus seem accurately to predict congressional intent over 98% of the time. Obviously, the presumption against retroactivity more accurately predicts legislative intent than would a contrary presumption.

In addition, this Court has held that because retroactive legislation poses special risks of unfairness, the retroactive aspects of laws must separately meet the test of due process. *Romein*, 112 S. Ct. at 1112; *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery* v. *Turner Elkhorn Mining Co.*,

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[5] This count excludes ceremonial, housekeeping, budgetary and technical correction statutes.

428 U.S. 1, 16-17 (1976). The "retroactive application of the legislation [must] itself [be] justified by a rational legislative purpose." *R.A. Gray*, 467 U.S. at 730. It would be difficult indeed to assess the legislative purpose behind the retroactive application of a law when that application was not considered or expressly required by the legislature. The traditional rule requiring an expression of legislative intent before a law will be applied retroactively at the very least increases the possibility that a court will be able to identify the rational legislative purpose for retroactive application.

Finally, application of a rule that laws will be given retroactive effect only if Congress says so will have the salutary effect of diminishing litigation over the degree of reliance placed on prior law by a given defendant. See *Luddington*, 966 F.2d at 229 ("[r]etroactive application carefully tailored to situations * * * in which those reliance interests are minimal would engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary").

C. *Bradley* and *Thorpe* Need Not Be Viewed As Deviating From The Traditional Rule.

The conventional wisdom appears to be that *Thorpe* and *Bradley* sharply deviated from the presumption against retroactivity, and that in *Bowen* the Court returned to the presumption and ignored *Thorpe* and *Bradley* thus creating a "tension" that this Court must resolve. There is certainly dicta in *Thorpe* and *Bradley* that seems contrary to the traditional rule. But both cases can be viewed as applying new law prospectively to their particular circumstances.

Thorpe involved a public housing tenant who had been served with an eviction notice one day after being elected president of a tenants' organization. The Housing Authority did not tell her why she was being evicted. She resisted the eviction, claiming it was in retaliation for the exercise of her First Amendment rights, and while the case was pending a new regulation went into effect requiring that tenants be notified of the reasons for their eviction. The Court held that the new regulation applied and that the petitioner could not be evicted without the required notice of reasons. The critical fact in

Thorpe was that the petitioner had not yet been evicted when the new regulation went into effect:

> [The Housing Authority] refuses to apply [the regulation] to petitioner simply because it decided to evict her before the circular was issued. Since petitioner has not yet vacated, we fail to see the significance of this distinction. We conclude, therefore, that the [regulation] should be applied to all tenants still residing in McDougald Terrace, including petitioner * * *.

393 U.S. at 283. If the Court had applied the regulation to previously-evicted tenants, that would have been retroactive. But applying it to tenants still residing in the housing project was not retroactive. The event governed by the new regulation -- the eviction -- had not yet occurred. See *Republic Nat. Bank of Miami* v. *United States*, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring) ("not every application of a new statute to a pending case will produce a 'retroactive effect.' '[W]hether a particular application *is* retroactive' will 'depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated.'") (citation omitted) (emphasis in original).

Bradley involved a petition for attorney's fees and costs in a school desegregation case. The district court awarded fees and costs to the prevailing plaintiffs, but the court of appeals reversed. While the appeal was pending, Congress passed a new law that made it clear that fee awards were authorized in such cases, and this Court held that the law applied to the pending case. Of course, it has long been recognized that fee petitions raise issues that are collateral to the underlying litigation. *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982). Thus, in Justice Scalia's words, "[i]t is at least arguable that it does not constitute retroactive application to apply a provision dealing with the award of costs or fees in litigation to all litigation that has not yet terminated when the provision takes effect." *Kaiser Aluminum*, 494 U.S. at 849.

II. THE PRESUMPTION AGAINST RETROACTIVITY FULLY APPLIES TO THE CIVIL RIGHTS ACT OF 1991.

We have shown above that this Court has consistently applied the presumption that statutes do not apply retroactively. Petitioners and their *amici* contend, however, that the presumption governs only when a new statute makes "substantive" changes in the law, and a presumption in favor of retroactivity governs when a new law makes "procedural" or "remedial" changes. This contention is plainly wrong: the Court has repeatedly applied the rule against retroactivity to laws that were "procedural" or "remedial." In any event, such a distinction would not benefit petitioners here, because the changes wrought by the Civil Rights Act of 1991 are "substantive" in every meaningful sense of that term.

It may be that most procedural changes are unlikely to have any retroactive effect (*i.e.*, to change the consequences of prior conduct) and may routinely be applied to pending cases. See, *e.g.*, *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 315 (1908). As Judge Posner put it, "[p]rocedural innovations not likely to bias decision systematically in favor of one litigant rather than his opponent can, without serious affront to the values crystallized in the phrase 'rule of law,' be applied to cases pending when the innovations were adopted." *Luddington*, 966 F.2d at 228. Application of such changes to pending cases have only prospective effects. But the changes made by the Civil Rights Act of 1991 at issue in this case would change the legal consequences of prior conduct and would therefore affect the rights and liabilities of the parties; application of the Act to pending cases would thus be retroactive and improper.[6]

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[6] The only provision of the Act at issue in this case that might be viewed as procedural is the right to a jury trial under Section 102. However, under the 1991 Act a jury trial is available only if the complaining party seeks compensatory or punitive damages under Section 102. If the new Act's cause of action for compensatory and punitive damages is not applied retroactively -- and it should not be -- retroactive application of the jury trial provision will never arise as a separate issue.

Relying primarily on decisions of this Court that use the term "remedial" in a very different sense, petitioners and their *amici* argue that the critical provisions of the Act are merely "remedial," and not "substantive," because they do not "make[ ] illegal conduct that formerly was legal" (U.S. Br. at 21) and because they provide "additional remed[ies] for intentional misconduct that was illegal under Title VII before the effective date of the 1991 Act." *Id.* at 22. Under this theory, the Act's new causes of action for compensatory and punitive damages and its significant expansion of the scope of the actions covered by Section 1981 are not "substantive," do not affect the rights and liabilities of parties, and therefore can be applied retroactively.

It does not make sense to rely on labels like "procedural," "remedial," and "substantive" in deciding whether a new law should be applied to pending litigation. But even if those labels were significant, the notion that Section 102's newly-added cause of action under Title VII for compensatory damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and * * * punitive damages" is not substantive and does not affect the rights and liabilities of the parties borders on the absurd. See *United States* v. *Burke*, 112 S. Ct. 1867, 1874 n.12 (1992).

Equally untenable is the claim that no substantive rights or liabilities are involved in expanding the scope of Section 1981 to include not only the making and enforcement of contracts, but also the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Section 101. The fact that in some cases the conduct now prohibited by Section 1981 was already prohibited by Title VII hardly means that the expansion of Section 1981 does not affect the rights and liabilities of parties to Section 1981 suits -- if it did not, why would the law have been changed, why would the debate over *Patterson* have been so heated, and why would this issue have been raised in litigation?

A. *Bennett* Does Not Support A Presumption In Favor Of Retroactivity.

Petitioners claim that the distinction between "substantive" and "remedial" changes is supported by this Court's decision in *Bennett* v. *New Jersey*, 470 U.S. 632 (1985), and that "*Bennett* is consistent with a long line of decisions of this Court applying new statutory provisions that are procedural or remedial in nature in pending litigation." U.S. Br. at 20, citing *Ex parte Collett*, 337 U.S. 55, 71 (1949); *Bonet* v. *Texas Co.*, 308 U.S. 463, 467 (1940); *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); and *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833). On close examination, neither *Bennett* nor the "long line of decisions" supports petitioners' distinction.

Bennett involved the use of federal funds provided to the State of New Jersey under Title I of the Elementary and Secondary Education Act of 1965. New Jersey had allocated some of the funds to ineligible schools in Newark in 1970-1972, and the U.S. Department of Education sought to recover those funds. The state argued -- and the Third Circuit held -- that a 1978 amendment to Title I that gave the states more leeway in allocating funds applied retroactively, citing *Bradley*. This Court reversed, holding that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639.

The Court cited two cases in support of its holding: *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982), and *Greene* v. *United States*, 376 U.S. 149, 160 (1964). *Security Industrial Bank* held that a change in the bankruptcy laws that allowed individuals to avoid liens on their household furnishings was not to be applied retroactively:

> The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. This Court has often pointed out [that] "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such construction if it is susceptible to any other."

459 U.S. at 79-80 (citations omitted). Although the Court cited *Schooner Peggy* in support of the rule against retroactive construction (*id.* at 80), it did not mention *Bradley*.

Greene v. *United States* involved an employee of a military contractor who was fired when the Department of the Navy revoked his security clearance. He challenged the revocation and obtained a favorable judgment in 1959. He then filed a claim for his loss of earnings pursuant to a 1955 regulation. In 1960, while his claim was pending, the Defense Department issued a new regulation changing the rules regarding monetary restitution. The Court once again recited the rule against construing a law to have retrospective effect, and held that the 1960 regulation was not applicable.

Bennett, *Security Industrial Bank*, and *Greene* lend absolutely no support to the claim that statutes which do not make illegal conduct that formerly was legal should be presumed to apply retroactively. To the contrary, *Bennett* held that whenever a new law "*affect[s]* substantive rights and liabilities," it is to be "presumed to have only prospective effect." 470 U.S. at 639 (emphasis added). Petitioners' reasoning -- that a new law is regarded as "substantive" and given prospective effect only when retroactive application would unfairly penalize conduct that was legal when it was performed -- cannot explain the outcome of *Bennett*, in which the new law made *legal* conduct that was previously *illegal*. Nor does the decision sustain the far-fetched notion that a law that provides a cause of action for compensatory and punitive damages where none existed does not affect the liabilities of defendants.

Security Industrial Bank and *Greene* also contradict petitioners' argument. The statute at issue in *Security Industrial*

Bank -- one that allowed individual debtors to retain their household furnishings -- can certainly be characterized as going to the remedies available in bankruptcy proceedings, but the Court nevertheless applied the presumption *against* retroactivity. *Greene* involved a procedural regulation, yet it too carried the presumption of prospectivity. In all three of these cases, the law at issue -- like the Civil Rights Act of 1991 -- affected the rights and liabilities of the parties with regard to past events, and were presumed prospective without regard to such labels as "remedial," "procedural," and "substantive."

B. Prior Decisions Of This Court Do Not Support Petitioners' Distinction.

Ex parte Collett demonstrates with particular clarity the flaw in petitioners' argument that "remedial" laws are presumed to have retroactive effect. The issue in *Collett* was whether the recently enacted 28 U.S.C. § 1404(a), allowing a district court to transfer a civil action to another district on *forum non conveniens* grounds, applied to pending actions. The Court held that it did apply:

> Clearly, § 1404(a) is a remedial provision applicable to pending actions. And "No one has a vested right in any given mode of procedure . . . ."

337 U.S. at 71 (citation omitted).[7] The use of the term "remedial" to refer to a change in venue law is a very different usage than the one petitioners urge upon the Court.

Collett, Sampeyreac, and many other cases use the term "remedial" as pertaining to the "means employed to enforce a right or redress an injury." *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918). As is clear from the passage from *Collett*, in this sense "remedial" is very much like "procedural," and does not at all refer to the amount of money one can

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[7] The omitted citation is to *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922), which held that a retroactive change in state procedural rules did not violate the Due Process Clause. That issue -- and not the one involved in this case -- was decided in *Sampeyreac*, which held that an expressly retroactive law was not invalid. 32 U.S. (7 Pet.) at 238-239.

recover for the violation of a right or to the kinds of injuries (*e.g.*, emotional pain and suffering) for which compensation may be available.[8]

This Court has long applied the presumption against retroactivity to new laws that can be characterized as "procedural" or as "remedial" in petitioners' sense of that term. For example, in *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306 (1908), the Court applied the presumption to an amendment to a federal statute governing the procedures by which subcontractors and "material-men" on government building projects could bring an action for payment against the primary contractor. At first blush, the amendment seemed purely procedural -- it required the subcontractor to wait until after the project was completed to bring suit, and then to stand in line behind the government to collect under the terms of the contractor's performance bond. But because the amount that the subcontractor could recover would depend on what was left after the government took its due (the remainder would "be distributed *pro rata* among" the subcontractors), the Court held that it was presumed to be prospective only. 209 U.S. at 314-316. Of course if the rule were that any new law affecting the amount a party could recover was "remedial" and therefore presumed retroactive, the case would have come out the other way.

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160 (1928), held that a remedial change in the tax laws was not retroactive. The Revenue Act of 1924 required the government to include interest from the date of collection when it refunded taxes illegally or erroneously collected; previously the interest commenced six months after the taxpayer filed a refund claim. The Court held that the statute was not to be given retroactive

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[8] The other cases cited in support of the petitioners' interpretation of *Bennett* are equally unavailing. As mentioned earlier (*supra* note 8), *Sampeyreac* involved the very different issue of whether an expressly retroactive law violates due process. *Hallowell* v. *Commons* and *Railroad Co.* v. *Grant* held that when Congress removes jurisdiction over certain matters from a court, pending litigation cannot continue. And *Bonet* v. *Texas Co.* merely recites a holding of the Supreme Court of Puerto Rico under local law relating to a purely procedural change.

effect "unless the legislative purpose so to do plainly appears." 276 U.S. at 162-163. Again under petitioners' rule the case would have been decided differently, because it "merely" related to the amount of money the taxpayer was entitled to collect as a result of the already-illegal taxation. See also *United States* v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) (the presumption that statutes are not retroactive "has been applied by this Court to statutes governing procedure * * * and specifically to the limitations of actions,"); *Sohn* v. *Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873) (statute of limitations); *McEwen* v. *Den*, 65 U.S. (24 How.) 242, 244 (1860) (procedures for registering conveyances); *Murray* v. *Gibson*, 56 U.S. (15 How.) 421, 423 (1853) (time period for enforcement of out-of-state judgments); *Prince* v. *United States*, 19 F. Cas. 1331, 1332 (C.C.D. Mass. 1814) (Story, J.) (emphasis added) (statute reducing duty on prize goods; "It is a general rule, that statutes are to be construed to operate in futuro, unless from the language a retrospective effect be clearly intended. * * * *And this maxim applies as well to remedial, as to other statutes.*").

C. The Presumption Against Retroactivity Precludes Application Of A New Law That Would Change The Consequences Of Prior Conduct.

As the decisions discussed above demonstrate, in deciding whether the presumption against retroactivity precludes the application of a new law to a pending case, the determinative issue should not be whether the law can be pigeonholed as "procedural," "remedial," or "substantive," but instead whether application of the new law would change the consequences of past conduct (and thus be retroactive), or would merely govern future conduct or relationships (in which case the application would be prospective). In the former case the presumption applies, while in the latter it does not because application of the new law to the pending case would not have retroactive effect.

Thorpe is a perfect illustration of the latter situation. Application of the new regulation to the case simply meant that the Housing Authority would have to give existing tenants notice of the reasons for eviction before they could be forced from their homes. The Court did not rule that the regulation

applied to tenants who had already been forced out of their apartments; that reading of the regulation would have been retroactive, and the presumption against retroactivity would apply. To give another example, a change in the Federal Rules of Civil Procedure requiring parties to turn over relevant documents within a short time after litigation commences would be immediately applicable to lawsuits over past conduct, because application of the new rule would regulate the future conduct of the litigation and would not regulate or retroactively penalize the past conduct that gave rise to the lawsuit. But if the new rule enhanced the penalties for discovery abuse, it would not apply to abuse that occurred before its effective date.

Thus, the critical inquiry is not whether the presumption against retroactive application of new laws applies equally to a particular kind of law. This Court's decisions demonstrate that it applies to all laws. The inquiry is whether application of the new law to the pending case would truly have retroactive effect -- whether it would change the consequences of past conduct.

D. The Far-Reaching Provisions of the 1991 Civil Rights Act Should Not Be Applied Retroactively.

The Civil Rights Act of 1991 greatly expanded the federal discrimination laws, and application of the Act to these cases would clearly change the consequences of past conduct. Among other things, the Act expanded the scope of 42 U.S.C. § 1981. Section 101. For the first time, it gave plaintiffs claiming intentional employment discrimination a cause of action for compensatory and punitive damages, to be tried before a jury. Section 102. It modified the legal standards governing disparate impact claims (Section 105), prohibited the discriminatory adjustment of test scores (Section 106), and authorized payment of expert witness fees as part of attorneys' fees. Section 113. The Act also expanded the scope of Title VII to cover U.S. citizens working abroad for U.S. companies (Section 109) and gave new protection against employment discrimination to federal employees. Section 117, Title III.

This Court recently recognized the far-reaching effects of the Act, and indicated that the Act fundamentally changed the nature of the injuries that are compensable under Title VII:

> Respondents contend that Congress' recent expansion of Title VII's remedial scope supports their argument that Title VII claims are inherently tort-like in nature. Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a jury trial, at which they may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages. Unlike respondents, however, we believe that Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit.

United States v. *Burke*, 112 S. Ct. 1867, 1874 n.12 (1992) (citations omitted).

Although petitioners raise claims under only two sections of the Act (Sections 101 and 102), the breadth and importance of the entire statute counsel strongly against retrospective application. Moreover, the two sections at issue in this case greatly affect the rights and liabilities of parties. Prior to the Act, Section 1981 provided a cause of action for race discrimination in the making and enforcement of contracts. *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). Section 101 of the Act expands the coverage of Section 1981 to include discrimination in the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Before the 1991 Act, Title VII claims were tried by the court, and plaintiffs could only recover back pay and other equitable relief. The new Act provides a cause of action for compensatory and punitive damages of up to $300,000 per plaintiff, to be tried before a jury. Section 102. For the first time, plaintiffs can recover for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and * * * punitive damages." *Ibid.*

Even if petitioners' contention that the presumption against retroactivity should not apply to "procedural" or "remedial" statutes were persuasive -- and it is not -- their characterization of these provisions as "procedural" and "remedial" grossly understates their significance. In addition, their argument that there is nothing unfair about applying these provisions retroactively because discrimination was illegal before the Act became law ignores reality and defies common sense. The fact that there is some overlap between Title VII and Section 1981 does not negate the fact that the Act greatly expanded the scope of Section 1981. Section 102 not only increases the amount of potential damages in Title VII cases, but it vastly expands the kinds of injuries that are subject to compensation.

The Act goes much further than increasing the compensation available for injuries already compensable under prior civil rights law, but even if that was all it did, retroactive application would not be warranted. As Judge Posner put it:

> It could be argued that since the underlying norm of nondiscrimination was not new, employers should not be heard to complain that the norm has now been given teeth. But many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment; and in fact such a change although purely remedial would violate the ex post facto clause. The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change. That is the philosophy behind the ex post facto clause and also behind the interpretive principle that presumes that a new civil statute applies only to conduct that occurs after its effective date. (*Luddington*, 966 F.2d at 229).

Contrary to petitioners' characterization (Landgraf Br. at 31-32), Judge Posner's argument is not that employers previously thought it acceptable to violate the antidiscrimination laws because in some circumstances the penalties were relatively

small. To the contrary, the point is that the measures employers will take to make sure violations do not occur will depend on the possible penalties. The firms regulated by the antidiscrimination laws are frequently large and complex, and can be found to violate the employment discrimination laws as a result of actions that were not taken or authorized by senior management. In addition, as this Court's caselaw demonstrates, it is not always readily apparent whether particular conduct violates the civil rights laws. The rules and procedures employers put into place to avoid violations of the civil rights laws -- or any other laws, for that matter -- quite properly depend in part on the penalties for noncompliance. To change those penalties retroactively without giving employers the opportunity to reassess their rules, procedures and activities is simply unfair.

We support those changes in the civil rights laws that will reduce or eliminate future employment discrimination. But in the context of this statute, and in other laws as well, imposing additional, unforeseen liability for past conduct is fundamentally unfair. Retroactive legislation raises serious concerns when it is passed by Congress. The traditional rule properly places the burden on Congress explicitly to make a law retroactive when it intends to do so. This Court should reaffirm that rule.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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No. 92-757 and No. 92-938

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,
Petitioner,
v.
USI FILM PRODUCTS, BONAR PACKAGING, INC., and QUANTUM CHEMICAL CORPORATION,
Respondents,

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,
v.
ROADWAY EXPRESS, INC.,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council ("EEAC") and the Chamber of Commerce of the United States of America ("Chamber") respectfully submit this brief as

amici curiae. The written consents of all the parties have been filed with the Clerk of this Court. This brief argues for affirmance of the decisions of the courts below and thus supports the position of the respondents in both cases.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of discrimination. Its membership includes over 280 major U.S. companies, as well as several associations which themselves have hundreds of corporate members. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in 260 cases of importance to the business community. Many of those cases have been before this Court. For example, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); and *Hazen Paper Co. v. Biggins*, —— U.S. ——, 113 S.Ct. 1701 (1993).

Substantially all EEAC and Chamber members, or their constituents, are employers subject to various equal em-

ployment laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. 1981, the statutes at issue herein. Moreover, many EEAC and Chamber members have made decisions regarding employment relationships, and litigation strategies in pending cases, based upon the state of the law as it existed prior to the enactment of the Civil Rights Act of 1991. P.L. 102-166 (1991).

Because of its interest in the application of the nation's equal employment laws, EEAC, since its founding in 1976, has filed over 320 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals, and various state supreme courts. As a part of this activity, EEAC participated as *amicus curiae* in many of the cases specifically addressed by provisions of the 1991 Act.[1] In addition, following passage of the 1991 Act, EEAC filed extensive comments regarding the issue of its retroactive application with the Equal Employment Opportunity Commission. EEAC also has filed briefs in almost all of the Circuits arguing that the 1991 amendments are not retroactive.[2] Thus, both EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in these cases. Indeed, EEAC and the Chamber are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties.

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[1] Among the cases briefed by EEAC are: *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 754 (1989); and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

[2] *See e.g., Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993); *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992); *Rodriguez v. General Motors Corporation*, No. 91-55170 (9th Cir. brief filed on May 13, 1992); and *Atonio v. Wards Cove Packing Co., Inc.*, Nos. 91-35306, 35861 (9th Cir. brief filed on May 1992).

STATEMENT OF THE CASE

These two cases have been consolidated for review by this Court. The first case, *Harvis, Rivers and Davison v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), involves a race discrimination claim brought under Title VII and 42 U.S.C. § 1981. The second case, *Landgraf v. USI Film Products, Bonar Packaging Inc., and Quantum Chemical Corp.*, 968 F.2d 427 (5th Cir. 1992), is a sexual harassment suit filed under Title VII. Both circuits considered the issue of whether the Civil Rights Act of 1991 should be applied retroactively to the plaintiffs' cases.

Both circuits held that the Civil Rights Act of 1991 was not retroactive. In *Harvis*, the court below adopted the reasoning of the courts in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) and *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 86 (1992) which declined to apply § 101 of the 1991 Act to a claim under 42 U.S.C. § 1981 that was pending on appeal at the time of the enactment of the 1991 Civil Rights Act. The court declined to apply the Act retroactively and based its decision on the Act's language and legislative history and the effect the 1991 Act will have on the parties' substantive rights and liabilities.

The *Harvis* court followed *Fray*'s analysis of the legislative history of the 1991 Act. In *Fray*, the court examined the retroactive application of § 101 of the Civil Rights Act of 1991, which overruled the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Fray* held that the 1991 Act was not retroactive since a bill in 1990 specifically making the Act retroactive was vetoed by the President and Congress failed to override the veto. Since Congress deleted the retroactive language because it did not have the votes to override a veto of bill with a retroactive application, the court reasoned that the 1991 Civil Rights Act was prospective in its application. The *Fray* court stated the following:

> We think a rather clear picture emerges from this review of the Act and its legislative history. Proponents of retroactively overruling *Patterson* commanded a majority in both houses of Congress, but they could not override the President's veto of a 1990 bill that contained express retroactive provisions. Thus, proponents could do no better than send an ambiguous law to the judiciary.

Fray, 960 F.2d at 1377. The *Fray* court also noted that the sections of the 1991 Act that were made expressly prospective were included by retroactivity opponents to "hedge their bets." *Id.*

The Sixth Circuit also followed *Vogel*, which examined the Act as a whole and concluded that applying the Act retroactively would adversely affect the parties' substantive rights and liabilities. *Harvis*, 973 F.2d at 497. Since the Act would affect substantive rights, the court concluded that the Act should not be applied retroactively. *Harvis*, 973 F.2d at 496-97.

The issue of substantive rights and liabilities was the basis for the Fifth Circuit's decision in *Landgraf*. The court below held that the new availability of a jury trial and compensatory and punitive damages for Title VII claims should not be applied retroactively because it would affect substantive rights and liabilities.

The *Landgraf* court decided that a retroactive application of the Act would result in manifest injustice. In the case of jury trials, for example, the court held,

> We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. . . . To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted.

Landgraf, 968 F.2d at 432-433.

The Fifth Circuit was equally convinced that the Act's new provisions for compensatory and punitive damages should not be applied to pending cases. The court stated, "Retroactive application of th[ese] provision[s] would result in a manifest injustice. . . . The amended damage provisions of the Act are a seachange in employer liability for Title VII violations." *Id.* at 433. The court continued,

> It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. Unlike *Bradley*, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose 'an additional or unforseen obligation' contrary to the well-settled law before the amendments.

Id. (quoting *Bradley*, 416 U.S. at 721).

SUMMARY OF ARGUMENT

The courts below properly held that the Civil Rights Act of 1991 is not retroactive, recognizing that the Act's language, legislative history, and effect on substantive rights and liabilities favor a prospective application of the Act to pending cases.

The legislative history of the 1990 conference bill and the 1991 Act clearly demonstrates that the Civil Rights Act of 1991 is to apply only prospectively, because the retroactivity language present in the 1990 bill is absent from the 1991 Act. The 1990 conference bill (S. 2104) contained specific and detailed provisions that provided for a retroactive application of the bill. After the bill passed both the House and the Senate, the President vetoed the bill and stated in his veto message that the bill was vetoed in part because of "unfair retroactivity rules." President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632, 1634 (October 22, 1990).

Because Congress could not garner the necessary votes to override the veto, the 1990 Act was not passed into law. When the 1991 Act progressed through Congress, it also initially contained specific language applying most provisions retroactively. However, Congress knew in 1991 that the Civil Rights Act would not be signed into law if it operated retroactively. Therefore, the retroactive language was deleted from the final version of the bill, thus indicating Congress's intent that the 1991 Civil Rights Act not be applied retroactively. Thus, as in *Bradley*, the ultimate exclusion of original language on the retroactivity issue provides evidence that Congress intended an opposite result. *Bradley*, 416 U.S. 716 n.23.

In addition, the two sections of the Act, §§ 402(b) and 109(c), that specifically reject a retroactive application do not create the inference that the remainder of the Act should be applied to pending cases. These sections were added as an insurance policy to protect constituent interests against any remote chance that the Act would be applied retroactively.

The Act also should be applied prospectively because it affects the substantive rights and liabilities of the parties. This Court held in *Bennett v. New Jersey*, 470 U.S. 632 (1985), that "statutes affecting substanitve rights and liabilities are presumed to have only prospective effect." *Id.* at 639.

Finally, Congress did not explicitly state that the changes made by the 1991 Act were retroactively restoring prior Congressional intent and thus, those changes should not be applied retroactively.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY CLEARLY DEMONSTRATE THAT THE 1991 CIVIL RIGHTS ACT WAS INTENDED TO BE PROSPECTIVE ONLY.

A. The President's Veto Of The 1990 Civil Rights Act, Based In Part On The Bill's Retroactivity, Ensured That The 1991 Act Would Be Given Prospective Effect Only.

1. *When Congress ultimately refused to include the retroactivity language from the 1990 civil rights conference bill in the Civil Rights Act of 1991, Congress clearly indicated that the Act should be prospectively applied.*

This Court has considered the issue of whether a statute may be applied retroactively, absent explicit retroactive language. In *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), this Court decided that it was permissible to retroactively apply an attorney's fee statute that took effect during the pendency of an appeal. But the Court so ruled because Congress had deleted language making the bill prospective only. Here, by contrast, Congress dropped language making the bill retroactive, thus evidencing an intent to delete any retroactive effect. This history, therefore, makes the 1991 Act prospective only.

In reaching its decision, the Court in *Bradley* thoroughly examined the legislative history of the statute in order to ascertain and construe the intent of Congress. 416 U.S. at 714. The Court found that the legislative history of the statute provided implicit support for a retroactive application. The Court found that the legislation that ultimately resulted in the attorney's fee statute grew out of a bill that initially had explicitly provided for a prospective application. 416 U.S. at 716 n.23. This prospective application language was deleted, however, in the Senate. *Id.* *Bradley* reasoned, therefore, that the evolution of the language provided implicit support for a

retroactive application. *Id.* Because it was apparent that the provision explicitly providing for prospective application had been stricken during the Congressional negotiations on the bill, the Supreme Court refused to read into the statute the very provision that Congress had eliminated. *Id.*

A similar legislative situation, with an opposite result, is presented in the Civil Rights Act of 1991. Section 15 of the 1990 Civil Rights conference bill (S. 2104 —the precursor to the Civil Rights Act of 1991) contained specific and detailed provisions that provided for retroactive application of the bill to "proceedings pending on or after" specific dates. S. 2104, passed by both the House and the Senate, was vetoed by the President on October 22, 1990. 136 Cong. Rec. S16418. The President's veto message indicated that the bill was vetoed in part because of "unfair retroactivity rules." President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632, 1634 (October 22, 1990).

In the next Congress, H.R. 1, the forerunner of the Civil Rights Act of 1991, initially contained almost the same retroactivity language as the vetoed 1990 bill. The original version of H.R. 1 contained the following language pertaining to the retroactive application of the bill to pending cases:

> (1) Section 102 shall apply to all proceedings pending on or commenced after June 5, 1989;
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> (2) Section 103 shall apply to all proceedings pending on or commenced after May 1, 1989;
>
> (3) Section 104 shall apply to all proceedings pending on or commenced after June 12, 1989;
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> (4) Sections 105(a)(1), 105(a)(3) and 105(a)(4), 105(b), 106, 107, 108, and 109 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) Section 105(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) Section 110 shall apply to all proceedings pending on or commenced after June 15, 1989.

See H.R. 1, 102nd Cong. 1st Sess. 113 (1991).

In addition to the above rules, H.R. 1 also contained complicated transition rules governing the application of the Act to orders already entered in pending cases. *Id.* This language was virtually identical to Section 15 of S. 2104, the failed 1990 bill. Although H.R. 1 passed the House, President Bush stated that he would veto the bill in that form. When the final Senate compromise was worked out, the retroactivity language was removed in the Senate version and it does not appear in the bill as ultimately enacted into law. *Compare* Section 402 with H.R. 1, 102nd Cong., 1st Sess. 113 (1991).

The specific deletion of the retroactivity provision illustrates Congress's desire to make the 1991 Act prospective only. Congress needed to present a bill to the President that operated prospectively because the President had stated that he would veto a bill with a retroactive application. Since Congress, as evidenced by its experience with the 1990 Act, did not have the necessary votes to override a presidential veto, it opted for language that the President would sign, and that language included a prospective application of the Act.

The court in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, agreed with this analysis:

> [T]he President [in 1990] vetoed a bill containing an explicit retroactivity provision. That veto could not be overridden and a compromise bill omitting those provisions was then enacted. Whatever ambiguities may be found elsewhere in the Act and its legislative history, we think this history is dispositive, even under *Bradley*. When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process.

Id. at 1378.

In *Maddox v. Norwood Clinic*, 783 F. Supp. 582 (N.D. Ala. 1992), the District Court also held that the omission of retroactive language from the 1990 bill was indicative of Congress's intent to apply the 1991 Act prospectively.

> This legislative history demonstrates that Congress knew how to provide for retroactivity when it intended to do so; it also suggests that retroactivity was one of the issues on which compromise was necessary. The 1990 bill called for retroactivity but was vetoed, while the 1991 bill does not call for retroactivity; this indicates to the court a collective intent on the part of Congress to eliminate retroactive application of the statute. More importantly, the fact that H.R.1 (1991) had the retroactive language in it and S.1745 (1991) does not, coupled with the fact that the Act does not have the retroactive language, is even stronger evidence of this collective congressional intent. The court is satisfied that Congress did not intend retroactive application of the Act.

Id. at 585.

2. *The House's 1991 handling of the Bush Administration's alternative to H.R. 1 was different from Congress's deletion of retroactive language from H.R. 1 and thus does not indicate a retroactive application of the 1991 Act.*

On June 4, 1991, Rep. Michel offered the Bush Administration's alternative to H.R. 1, containing, among other things, a prospective application of the enactment section. The bill did not pass the Senate. The fact that the Administration's proposal did not garner a majority in the Senate is not, as the petitioners and supporting

amici argue, proof that the 1991 Act should be applied retroactively. Several factors differentiated the Senate's handling of the Administration's proposal from the vetoed 1990 Civil Rights bill.

The Administration's proposal, for example, was not a referendum on the issue of retroactivity. The debate centered on discussions of five Supreme Court decisions that Congress wanted either to modify or overturn—not on the prospective application of the Act. In fact, during debate on the Administration proposal, no discussion occurred regarding the prospective nature of Section 15. 137 Cong. Rec. H3897-H3909 (daily ed. June 4, 1991) (Discussion of H.R. 1357, the Michel substitute). Further, the bill was voted on *in toto* and the effective date provision was not taken up separately. Finally, it was clear to Congress from the President's 1990 veto message that a bill containing retroactivity rules would not be signed into law and that to be successful, a legislative proposal must not be retroactive. The treatment of the Administration's proposal, therefore, differs markedly from Congress's action on H.R. 1 which involved the deletion of specific retroactivity language.[3]

B. Floor Statements And Section-by-Section Analyses Submitted By The Prime Movers Of The 1991 Compromise Bill Clearly Demonstrated That The Act Would Operate Prospectively Only.

In addition to the deletion of the 1990 retroactivity language, statements by key Senate sponsors of the Civil Rights Act of 1991 further support the conclusion that a retroactive application of the Act was explicitly rejected. Senator Dole, in a section-by-section analysis of the bill,[4]

[3] *But see, Estate of Reynolds v. Martin*, 985 F.2d 470, 477 (9th Cir. 1993) and *Mozee v. Am. Commercial Marine Service Co.*, 963 F.2d 929, 933 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 207 (1992).

[4] Senators Burns, Cochran, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnel, Murkowski, Simpson, Seymour and Thurman endorsed this section-by-section analysis, as did the Bush Administration. 137 Cong. Rec. S15472.

clearly and unambiguously explained that the Act and its amendments do not apply to cases pending or arising before the date of enactment. 137 Cong. Rec. S15472-15478.

Senator Danforth—the primary architect of the final compromise Act—argued that the bill was intended to be applied prospectively, in accordance with Supreme Court principles of interpretation requiring statutes to be given prospective application only, unless Congress explicitly directs otherwise, citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1579 (1990) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). 137 Cong. Rec. S15483 (daily ed. Oct. 1991). Senator Danforth noted that he and the sponsors of the Act rejected the Supreme Court's analysis in *Bradley* as the relevant framework for interpreting the question of retroactivity of a bill. Following this statement, Senator Danforth introduced into the record an Interpretive Memorandum, expressing the intent of the original cosponsors of S. 1745 (except Senator Kennedy), which stated that "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively." 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991).

II. SECTIONS 402(b) AND 109(c) OF THE CIVIL RIGHTS ACT OF 1991 DO NOT EVIDENCE AN INTENT TO APPLY THE REMAINING PROVISIONS OF THE ACT RETROACTIVELY.

A. The Language Of The *Wards Cove* Exception Does Not Evidence Any Congressional Intent To Apply The Remainder Of The Act Retroactively.

Adding to the prospective/retroactive application debate was § 402(b) of the Act, the so-called *Wards Cove*

amendment.[5] This provision specifically states that the Act should only be applied prospectively to certain disparate impact cases. Section 402(b) reads as follows:

> Notwithstanding any other provisions of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983 [*i.e.*, the *Wards Cove* case].

This section is the primary basis for arguments that the rest of the statute must be applied retroactively. Senator Dole, however, clearly discredited this argument when he introduced into the record a "Legislative History, Technical Corrections" memorandum. The memo states in relevant part,

> Section 402 of the Act, and this amendment to section 402 . . . will not apply to cases arising before the effective date of the Act . . . absolutely no inference is intended or should be drawn from the language of this amendment to section 402 that the provision of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such retroactive application of the Act and its amendments is not intended . . . [n]ot only would retroactive application of the Act and its amendments to conduct occurring before the date of enactment be contrary to the language of section 402 and this amendment, but it would be extremely unfair.

[5] Section 402(b) was inserted at the insistence of Alaska Senators Murkowski and Stevens, who were motivated by constituent interests and a desire to avoid the battle over retroactivity foreseen by Senator Kennedy. The Senators from Alaska wanted to ensure that the Wards Cove Packing Company would not be covered by the 1991 Act. Their floor statements clearly and unambiguously state that "[a]bsolutely no inference is intended or should be drawn from the language of this amendment to Section 402 that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act." 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).

The full text of the memorandum can be found at 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991).[6]

Even Senator Kennedy, in his statements on the Senate floor both before and after the addition of the *Wards Cove* amendment, did not state that retroactive application of the bill was his intention or the intention of the collective body. Instead, he stated that the courts will determine whether the bill will apply to cases and claims that were pending on the date of enactment. 137 Cong. Rec. S15485. Senator Kennedy acknowledged that he disagreed with the supporters of the bill on the issue of nonretroactivity. *Id.*

Finally, Section 402(b) would not be rendered meaningless if it were not used to make the 1991 Act generally retroactive. As the legislative history clarifies, this par-

[6] Following Senator Dole's analysis of the *Wards Cove* amendment, Senator Durenberger also asserted that the bill was to be applied prospectively:

> I want to be clear that this vote does not change my view that the bill is completely prospective. . . [s]ome may attempt to argue at a later date that [the *Wards Cove* exemption] creates an inference that the bill, in general, is retroactive. . . that is the wrong conclusion to draw from this resolution. . . [w]e all know that the bill applies prospectively because that is what the plain language of the civil rights bill states.

The full text of Senator Durenburger's statement may be found at 137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991).

Senator Simpson also agreed that the provisions of the Civil Rights Act were to be applied prospectively and that adoption of the *Wards Cove* amendment did not alter that aspect of the bill's application:

> By including specific language to make it clear that the Wards Cove Co. will not be treated retroactively, I in no way am implying that all other companies with litigation pending on the date of enactment should be treated retroactively. To the contrary, I read section 402 of S. 1745 to apply the bill prospectively to all parties, so that no one with litigation pending on the date of enactment would have the rules changed on them.

Id.

ticular section was added for the specific and exclusive purpose of making absolutely certain that the disparate impact provisions would *not* apply to the Wards Cove Packing Company in its pending litigation, a company that had invested 24 years to defending a claim of disparate impact discrimination. 137 Cong. Rec. S15953, S15963, S15966 (daily ed. Nov. 5, 1991). *See also Fray v. Omaha World Herald Co.*, 960 F.2d at 1376; *Mozee v. Am. Commercial Marine Serv. Co.*, 963 F.2d at 933; and *Thompson v. Johnson & Johnson Mgmt. Info. Crt.*, 783 F. Supp. 893, 895 (D.N.J. 1992).

B. The Non-Retroactive Language In The Extraterritorial Exception Does Not Indicate That Congress Intended The Act Generally To Apply To Pending Cases.

Nor does the language of the extraterritorial exception in § 109(c) convey a congressional directive to apply the remainder of the Act's provisions retroactively. Section 109(c), which relates to extraterritorial application, states that "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Like Section 402(b), this section relates specifically to a case recently adjudicated by the Supreme Court, *EEOC v. Arabian Am. Oil Co.*, 111 S.Ct. 1227 (1991). *Fray v. Omaha World Herald Co.*, 960 F.2d at 1376; *Maddox v. Norwood Clinic, Inc.*, 783 F. Supp. at 584 ("Section 109(c) is known as the 'American Arabian exception' in reference to the Supreme Court's decision in *EEOC v. Arabian American Oil Co. . . .*"). *See also Guillory-Wuerz v. Brady*, 785 F. Supp. 889 (D.Co. 1992).

Thus, because §§ 402(b) and 109(c) were included for clear, self-contained, and limited purposes, no inferences about the retroactive application of the remaining provisions of the Act can be drawn from either § 402(b) or § 109(c). *Mozee*, 963 F.2d at 932-33; *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363, 1373 (5th Cir. 1992).

C. The Circuits That Applied The Act Only Prospectively Have Found That Section 109(c) And 402(b) Were Only To Be Reassurances That The Act Will Not Apply To Specific Cases.

Six circuits have considered and rejected the argument that the prospective language in §§ 109(c) and 402(b) indicates an intent to apply the rest of the 1991 Act retroactively. *Butts v. City of N.Y. Dept. of Housing*, 61 Fair Empl. Prac. Cas. (BNA) 579 (2nd Cir. 1993); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1557 (11th Cir. 1993); *Gersman v. Group Health Ass'n*, 975 F.2d at 890 (D.C. Cir.); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d at 1373 (5th Cir.); *Mozee*, 963 F.2d at 933 (7th Cir.); and *Fray*, 960 F.2d at 1377 (8th Cir.). These courts have determined that the prospective language should be construed merely as an extra assurance that the Act will not apply to specific cases.

The court in *Butts* held that the inclusion of the two provisions did not mean that the Act as a whole was retroactive. The court stated,

> [T]here is no suggestion that either [§§ 402(b) and 109(c)] was added against a background assumption that Congress intended the entire Act to be retroactive. They seem to have been inserted by individual legislators to protect constituent interests against the possibility that the statute ultimately would be held retroactive in the full knowledge that the retroactivity question was an open one that could go either way in the courts. The floor statements of Senators Dole and Murkowski that no inference should be drawn from the addition of § 402(b) considerably bolster this conclusion.

Butts, 61 Fair Empl. Prac. Cas. (BNA) at 588.

The *Vance* court also found that §§ 109(c) and 402(b) did not indicate that the Act is retroactive. *Vance* considered and rejected the holding of *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992),

which stated that the prospective only nature of the two provisions confirmed that Congress intended the Act to apply retroactively. The *Vance* court was unpersuaded by the *Davis* court's reasoning:

> The negative inference (that Congress intended general retroactivity) that the *Davis* court drew from sections 109(c) and 402(b) is an unhelpful legal fiction given the reality of a sharp conflict between legislators on the retroactivity of the Act generally. . . . Congress probably only intended for sections 109(c) and 402(b) to minimize, in specific instances, the risk posed by uncertain outcomes in the courts on the general retroactivity issue. And when a court holds that the Act *generally* applies prospectively, the court does not render sections 109(c) and 402(b) 'entirely redundant' nor inoperative. Those sections operate to ensure that although *some* court might hold the Act retroactive as a general matter, *no* court may hold that the Act applies in *Wards Cove* or in a section 109 case where the conduct predates enactment.

Id. at 1577 n.9 (citations omitted).

In *Gersman*, the District of Columbia Circuit indicated that §§ 109(c) and 402(b) could possibly be viewed "not as redundancies, but rather as insurance policies." *Gersman*, 975 F.2d at 890. The *Gersman* court also noted that it was certainly reasonable for the Alaska legislators to wish to reassure the *Wards Cove* defendants that the Act would not apply to the 24 year-old discrimination case, given the potentially drastic impact of retroactive application of the Act to the company. *Id.*

The Seventh Circuit in *Mozee* also refused to find the prospective language of §§ 109(c) or 402(b) as probative of congressional intent, recognizing that these sections were merely extra "assurance[s]," 963 F.2d at 933, and the court in *Fray* echoed this sentiment. 960 F.2d at 1377. Likewise, in *Johnson v. Uncle Ben's, Inc.*, the Fifth Circuit criticized the 109(c)/402(b) argument as

"too much negative implication." 965 F.2d at 1373. The *Johnson* court indicated that the negative implication argument was unpersuasive given the remainder of the Act's history. *Id.*

Thus, six circuits held that §§ 402(b) and 109(c) do *not* allow an inference that the Act as a whole would be applied retroactively. Because the sections are merely additional assurances that the Act will not be applied retroactively to specific cases, they should not be used to impute a retroactive effect to the Civil Rights Act of 1991.

III. IN ADDITION TO THE LEGISLATIVE HISTORY'S PROSPECTIVE APPLICATION, THE CIVIL RIGHTS ACT OF 1991 AFFECTS SUBSTANTIVE RIGHTS AND LIABILITIES OF INDIVIDUALS AND THEREFORE MUST BE APPLIED PROSPECTIVELY.

A. This Court Held In *Bennett* That A Statute Is Applied Prospectively When It Affects Substantive Rights And Liabilities. Since The Civil Rights Act Of 1991 Affects Substantive Rights And Liabilities, It Must Be Applied Prospectively.

This Court has dealt with the issue of retroactivity of statutes in two ways. One line of cases begins with *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974). In *Bradley*, the plaintiffs brought an action to compel desegregation of the public schools of Richmond. While the case was on appeal, Congress enacted § 718 of the Education Amendments of 1972, 20 U.S.C. § 1617, which granted federal courts authority to award attorneys fees to a prevailing party in a school desegregation case. The court of appeals ruled that the provision had prospective effect only, but this Court reversed.

In arriving at this conclusion, this Court held,

> [A] court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Id. at 711. In elaborating on this rule, this Court stated that an intervening change will not be applied to a pending action where it "would infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720.[7]

Against this backdrop and in a second line of authority, *Bowen v. Georgetown University*, 488 U.S. 204 (1988) reiterated the principle that, "Retroactivity is not favored in law. Thus, Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208.

The tension between *Bradley* and *Bowen* was revisited by the Court in *Bennett v. New Jersey*, 470 U.S. 632 (1985). In *Bennett*, the federal government was trying to recover from the state of New Jersey federal grant funds allegedly misused during the years of 1970-72. While the case was pending, Congress amended the statute governing grants in 1978. In holding that the Act would be applied prospectively, the *Bennett* court noted the *Bradley* court's limitation on the retroactive application of statutes: a court will not retroactively apply a statute when "to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Bennett*, 470 U.S. at 639.

The *Bennett* court concluded: "This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett*, 470 U.S. at 639. Thus, according to this Court in *Bennett*, a statute that affects substantive rights and

[7] As noted above, however, *Bradley* indicated that the ultimate exclusion of original language on the retroactivity issue provided evidence of congressional intent on this issue. Thus, where initial language on point is deleted, an inference of an opposite congressional intent can be drawn.

liabilities will have prospective effect only. *See also DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1393 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 799 (1991) (Restoration Act would not be applied retroactively because it affected a substantive right by imposing substantive liability on defendants in their individual capacities).

The *Bennett* decision has been the basis of several circuit court opinions concerning the effective date of the Civil Rights Act of 1991. The Court of Appeals for the District of Columbia Circuit, for example, followed *Bennett* and agreed that a statute affecting substantive rights should be applied prospectively. *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992). As in the instant case (*Harvis*), the court in *Gersman* was presented with the issue of whether the Civil Rights Act of 1991 should be applied retroactively to a claim alleging discrimination in the termination of a contract.

The court, after examining *Bradley*, *Bowen*, and *Bennett*, held that statutes that affected substantive rights should be applied prospectively only. The court stated the following:

> The Supreme Court in *Bennett* did not purport to overrule *Bradley*. But it noted that the *Bradley* decision concerned allowance of attorney fees, while acknowledging the continued vitality of the 'venerable rule of statutory interpretation' followed in *Security Industrial* and *Greene* as applicable to 'substantive rights and liabilities.' Therefore, we conclude that the Court has given us the basis upon which we must now distinguish the applicability of the two presumptions. The *Bowen* presumption must apply in the case of changes in substantive law. That being said, and *Bradley* still apparently being recognized by the Supreme Court, we agree with the Fifth Circuit that the *Bradley* presumption of applicability of law as of the time of decision must per-

tain to 'remedial provision[s]—not substantive obligations or rights under a statute.'

Gersman, 975 F.2d at 898-899 (citations omitted). *Accord Johnson,* 965 F.2d 1363, 1374 (5th Cir. 1992); *Mozee,* 963 F.2d at 936 (7th Cir.); and *Banas v. Am. Airlines,* 969 F.2d 477, 483 (7th Cir. 1992). *See also Vogel v. City of Cincinnati,* 959 F.2d 594, 598 (6th Cir. 1992). Thus, a statute that affects substantive rights and liabilities should be applied prospectively.

B. Application Of The Provisions Of The Civil Rights Act Of 1991 Would Substantively Change The Rights Of The Parties To Litigation Pending At The Time Of Enactment.

The provisions of the Civil Rights Act of 1991 make substantive changes to the state of the law as codified by Title VII and 42 U.S.C. § 1981 by eliminating affirmative defenses, expanding the type of conduct that is actionable, providing jury trials for certain cases, and providing additional damages that were not previously available.

1. The provisions permitting jury trials and punitive and compensatory damages are substantive changes to the law.

Prior to the enactment of the Civil Rights Act of 1991, allegations pursued under Title VII were tried before a judge, and awards to successful claimants were limited to back pay and/or reinstatement and injunctive relief. Under the 1991 Act, employers can now be held liable for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages for conduct engaged in with "malice or reckless indifference." *See* Section 102. In *Johnson v. Rice,* 58 Fair Empl. Prac. Cas. (BNA) 31 (S.D.Ohio 1992), finding that employers could theoretically be held liable for an additional $300,000 in compensatory damages to each plaintiff, the court indicated that "[s]uch a substantial

increase in a defendant's potential liability clearly 'creates a new liability in connection with a past transaction,' and leads to the inescapable conclusion that the compensatory damages provision of the Act is substantive in nature. . . ." *Id.,* at 34 (citations omitted).

Similarly, in *Maddox v. Norwood Clinic,* 783 F. Supp. 582 (N.D.Ala. 1992), the court agreed that the changes made by the Act are substantive. *Id.* at 586. Therefore, remedies such as these, where they were not previously available in the field of employment law, are substantive changes.

Moreover, under pre-Act law, a fundamental tenet of employment discrimination law is to "make persons whole for injuries suffered on account of employment discrimination." *See, Albemarle Paper Company v. Moody,* 422 U.S. 405, 418 (1975). Thus, the victims of discrimination should be, "so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper Co.,* 422 U.S. at 421 (*quoting* 118 Cong. Rec. 7186 (1972)). As illustrated above, the Civil Rights Act of 1991 changes this basic scheme by making punitive damages available, as well. *See* Section 102. The purpose of punitive damages is not to make the victim of discrimination whole, but to punish a bad actor. *Memphis Community School District v. Stachura,* 477 U.S. 299, 307 n.9 (1991). Thus, the availability of punitive damages is a radical departure from employment discrimination theory as practiced prior to the Civil Rights Act of 1991. Therefore, it is clear that the Civil Rights Act of 1991 substantively changes the law in order to provide new, additional types of damages for victims of unlawful conduct.

2. Other provisions of the Act eliminate substantive defenses previously available to employers.

In addition to providing for a jury trial and compensatory and punitive damages where intentional discrimina-

tion is alleged, the Act eliminates several substantive defenses that were available to employers under prior law. For example, section 101 of the Act reverses the Supreme Court's 1989 decision in *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), to make post contract-formation conduct actionable under § 1981 of the Reconstruction Era Civil Rights Act. In *Patterson,* the Supreme Court had concluded that the language of § 1981 covered discrimination only in the formation of contractual relationships, such as hiring decisions, and under limited instances, promotion decisions. The Act amends § 1981 to extend its coverage to all conduct pursuant to the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. *See* Section 101.

Section 107 of the Act reverses the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 109 S.Ct. 1775 (1989), which relied upon prior law in *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), effectively eliminating the "same decision" defense. Prior to the 1991 Act, selection decisions shown to have been motivated in part by discrimination were not unlawful if the employer could prove it would have taken the same action based upon nondiscriminatory criteria. Section 107 eliminates this defense on the liability question by making the selection decisions at issue unlawful even if the employer can prove that other lawful factors would have caused it to make the decision. *See* Section 107.

These provisions of the 1991 Act, in addition to others which reverse specific Supreme Court decisions, *e.g., Lorance v. AT&T Technologies, Inc.,* 490 U.S. 900 (1989) and *Martin v. Wilks,* 490 U.S. 754 (1989), are substantive in nature. *See* Sections 108 and 112. Decisions made during the course of an employment relationship based upon the state of the law prior to the Act may no longer be defensible because of the elimination of affirmative de-

fenses. Likewise, many employers faced with discrimination lawsuits may have made decisions during an investigation and the trial preparation that they might have made differently had they anticipated the elimination of these substantive defenses and the addition of the new remedies provided by the 1991 legislation.

It is of paramount importance that parties to a lawsuit have concrete, predictable standards by which to evaluate each case. Clearly, changing the rules of the game after discovery, trial preparation, and a hearing on the merits will substantially alter the rights of the employer in cases pending on the day of enactment.

Because the Civil Rights Act of 1991 affects substantive rights, the Act should be given prospective application only.

C. The Civil Rights Act Of 1991 Is Not Merely "Restorative"; The Act Affects Substantive Rights And Liabilities And Thus Must Be Applied Prospectively. An Explicit Intent To Restore The Law Retroactively Is Necessary For A Retroactive Application; Inferring Retroactive Intent Is Not Enough.

Any argument that the Civil Rights Act of 1991 is merely "restorative" and, therefore, should be interpreted retroactively is contrary to law and fact and must fail. The standard of clear congressional intent for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation. *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.,* 911 F.2d 1377, 1387 (10th Cir. 1990). *See also Fray v. Omaha World Herald Co., supra. Contra Ayers v. Allain,* 893 F.2d 732 (5th Cir. 1990) (The 1987 Restoration Act amendments held to be applicable to pending litigation based upon inferences attributed to the purpose of the statute).[8]

[8] The Fifth Circuit's opinion in *Ayers v. Allain* does not support application of the 1991 Act to pending cases, because the language

In *DeVargas*, the Tenth Circuit refused to interpret statutory language indicating Congress's desire to address certain Supreme Court decisions as "clear congressional intent" to restore retroactively. *Id.* at 1385. Indeed, *DeVargas* indicated that even when Congress expresses a restorative intent, retroactive application is not appropriate absent a clearer expression of purpose to apply the Act to pending cases. The text of the statute at issue in *DeVargas* contained the following provision:

> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . section 504 of the Rehabilitation Act of 1973 . . .; and
>
> (2) legislative action is necessary to *restore* the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Id. at 1384 (quoting Restoration Act § 2, 102 Stat. at 28 (1988) (emphasis added). The court also noted that the Senate report contained similar language, purporting to "overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, and to restore . . . the four major civil rights statutes that

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and history of the Civil Rights Restoration Act of 1987 is significantly different from that of the 1991 Act. The 1987 Act states that its purpose is to "restore" the law. The 1991 Act's purpose is to provide "additional remedies." Moreover, the *Ayers* court failed to discuss *Bradley* or *Bowen* and did not recognize that both *Bradley* and *Bowen* will not apply a statute retroactively where the legislative history shows that prior retroactive language has been deleted prior to final passage. *Ayers*, however, does cite to a district court decision relying on uncontested floor statements that the bill was intended to apply to pending cases. *Leake v. Long Island Jewish Medical Ctr.*, 695 F. Supp. 1414, 1417 (E.D.N.Y. 1988). By contrast, the 1991 Act's history is replete with numerous statements rejecting retroactive application. In any event, *DeVargas* demonstrates that *Leake's* reliance on an individual floor statement is misplaced. 911 F.2d at 1386.

prohibit discrimination in federally assisted programs." *Id.* at 1384-1385.

Despite the clear intent to "restore" the law, the court held that there was "clear congressional purpose to overturn *Grove City College*, but no clear expression of intent regarding retroactive application of the Act's amendments." *Id.* at 1385. The court found

> [t]hat the expressed congressional intent in the Senate report to 'restore' section 504 to its pre-*Grove City College* interpretation reflects unambiguously only Congress's purpose to reverse the Supreme Court's program-specific reading of federal prohibitions on discrimination by programs or activities receiving federal financial assistance. Because we must find clear congressional intent to invoke retroactivity, we cannot read 'restore' to mean 'retroactively restore,' particularly where the effect of such a reading would be to impose substantive liability for actions committed in reliance on *Grove City College* and its progeny prior to the passage of the Restoration Act in 1988.

Id.

The language of the Civil Rights Act of 1991 indicating that Congress acted in response to "recent decisions of the Supreme Court" does not evidence an intent to apply the provisions of the Act retroactively. In *Fray v. Omaha World Herald Co.*, the court noted that it searched long and hard and could not find anything in the Act or its legislative history which would indicate that retroactive overruling of *Patterson* was the intent of the legislature. *Fray*, 960 F.2d at 1377. For example, Section 2 of the 1991 Act finds that "additional" protections against discrimination are being provided; the word "restore" is not used. Moreover, the language in Section 3 of the Act clearly indicates that Congress intended to *expand* the law as articulated in certain Supreme Court decisions. *See* Section 3. Under *Devargas* and *Fray*, this language alone

cannot be interpreted as a collective intent to apply the provisions of the bill retroactively.

The court in *DeVargas* also cautions that to apply the provisions of a new law retroactively merely because the new law rejects a judicial interpretation is inconsistent with the constitutional division of authority between Congress and the Supreme Court. *Id.* at 1387. *See also Fray,* 960 F.2d at 1375. ("The presumption against retroactive application best preserves the distinction between courts and legislatures. The former usually act retrospectively . . . and the latter usually act prospectively"). The doctrine of separation of powers emphasizes that although it is Congress's prerogative to make the laws, the authority to interpret the law lies exclusively with the judiciary. *DeVargas,* 911 F.2d at 1387-1388, citing *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *See also, The Federalist* No. 78, at 116 (A. Hamilton) (H. Commager ed. 1949).

DeVargas emphasized,

> This rule of retroactive application of judicial decisions flows directly from the Court's function of interpreting law. Stated simply, what the Court interprets the law as saying is what the law says. Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law. These congressional amendments, however, cannot undo the Supreme Court's authoritative construction of the original statute. When a *subsequent Congress* amends the law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's 'restoration' efforts is newly created law. As with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity.

DeVargas, 911 F.2d at 1388 (emphasis added).

Moreover, application of the Civil Rights Act of 1991 to cases pending on its day of enactment raises additional constitutional questions. Where a new law contains punitive damages provisions, retroactive application may result in constitutional ex post facto and due process violations. *Louis Vuitton S.A. v. Spencer Handbags Corp.,* 765 F.2d 966 (2nd Cir. 1985) (declining to apply the Trademark Counterfeiting Act retroactively because to do so would present constitutional issues.) In *Louis Vuitton,* the Second Circuit refused to find that the retroactive application of the Act at issue would violate either the Ex Post Facto clause or the Due Process clause; however, "the presence of these concerns supports our preference for strictly prospective application." Id. at 972. Therefore, if retroactive application implicates such constitutional problems, prospective application of the statute is the better course. *Id.* In the cases at bar, the prospect of applying the 1991 Act to cases pending on its enactment date raises the specter of several constitutional questions. Thus, the wisest choice is to apply the statute prospectively.

CONCLUSION

The history of the Civil Rights Act of 1991 demonstrates the wisdom of *Bowen's* rule that retroactivity is not favored in law and that a statute should not be applied to pending cases unless Congress clearly expresses that intent. Indeed, it seems only logical that legislators who want a bill to apply to pending cases should be required to say just that.

Here, however, proponents of this legislation have failed to fulfill this basic requirement. They roundly criticized several of this Court's decisions as misinterpreting Congressional intent and claimed that they could do better. Ironically, the bill they crafted has generated thousands of hours of unnecessary attorney time just on the threshold question of the Act's effective date. Therefore, we urge the Court to apply the *Bowen* requirement that Congress must state clearly when a statute is retroactive. Perhaps

such a ruling will encourage Congress to say what it means instead of leaving its unfinished business to be sorted out by frustrated judges and litigants.

For the foregoing reasons, the *amici curiae* respectfully urge this Court to hold that the Civil Rights Act of 1991 does not apply to cases pending on the date of enactment.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Supreme Court, U.S.
FILED
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BARBARA LANDGRAF, *Petitioner*,
v.
USI FILM PROD., et al., *Respondents*.

MAURICE RIVERS, et al., *Petitioner*,
v.
ROADWAY EXPRESS, INC., *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF OF WARDS COVE PACKING COMPANY, AMICUS CURIAE, ON BEHALF OF RESPONDENTS

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I. INTEREST OF *AMICUS CURIAE*

Amicus curiae Wards Cove Packing Company, Inc. operates salmon canneries in Alaska and has its principal office in Seattle, Washington.[1] The company and Dole Food Company, Inc. were the petitioners in Wards Cove Packing Company, Inc. v. Atonio, 490 U.S. 642 (1989). This Court there held that plaintiff in a Title VII[2] action bears the burden of isolating and identifying the specific employment practices allegedly responsible for statistical disparities in the composition of the work force; that racial imbalance in one segment of an employer's work force is not sufficient to establish a *prima facie* case of unintentional discrimination ("disparate impact") with respect to the selection of workers in other segments of the employer's work force; and delineated the parties' respective burdens of

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[1] The parties have consented to the filing of this brief. The letters of consent are being filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

proof. Accordingly, the Court reversed and remanded the underlying court of appeals decision, Atonio v. Wards Cove Packing Co., Inc., 827 F.2d 439 (9th Cir. 1987).

In response to portions of Wards Cove and to several other decisions,[3] Congress passed the Civil Rights Act of 1991. The House Report on the Act said that the Supreme Court ruled in Wards Cove that once a complaining party proves an employment practice has a disparate impact, the employer has only the burden of production, not the burden of persuasion in justifying the practice. H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess., 29 (1991).

The Congress in enacting the 1991 Act stated:

The Congress finds that —

* * *

[3] The Civil Rights Act of 1991 also addresses Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), Martin v. Wilks, 490 U.S. 755 (1989), Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). See H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 23, 45, 49, 60, 89 (1991).

> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of federal civil rights protections; . . . .

To remedy the perceived consequence of the Court's interpretation of Title VII, Congress in the 1991 Act added to Title VII new subsections 701(l) through (p) and 703(k). H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 32 (1991). Summarizing the effects of the new legislation, the House Report said, "The Committee intends the proof of business necessity to be an affirmative defense as to which the respondent bears the burden of persuasion." Id., at 34.[4] Congress, then, has acted specifically to overturn part of the Wards Cove decision.[5]

[4] The House Report was drafted by the Education and Labor Committee and the Judiciary Committee. No Senate Report was submitted with the legislation. H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 1 (1991).

[5] The Civil Rights Act of 1991 left intact this Court's holding that internal comparative statistics are not probative where the employer hires from the external labor market. The Act also codifies, in §§ 105(a)(k)(1)(A) and (B), this Court's holding that plaintiffs bear the burden of persuasion with respect both to impact and to causation, and codifies,

The question presented by these consolidated cases is whether the Civil Rights Act of 1991 applies to cases pending when the Act was passed. The Senate passed the legislation on October 30, 1991, the House on November 7, 1991, and the President signed the Act into law on November 21, 1991. Statement of President George Bush Upon Signing S.1745, 27 Weekly Comp. Pres. Doc. 768 (Nov. 21, 1991). As of that time, after Wards Cove had been reversed and remanded by this Court and then remanded by the Ninth Circuit, the District Court had (in January 1991) again dismissed all of plaintiffs' claims, and plaintiffs had once again appealed to the Ninth Circuit. Their appeal has been pending for over two years.

Section 402(b) of the Act (codified in a note at 42 U.S.C. § 1981) provides:

> Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

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in § 105(a)(k)(1)(A)(i), this Court's holding that plaintiffs must prove the disparate impact of a particular practice.

Only the Wards Cove Packing Company v. Atonio case fits this exception. The section was added to the Act because it was thought that the companies, which had been found innocent of discrimination under the law existing at the time, should not be required to relitigate a case filed in 1974 and tried in 1982 under legislatively-mandated standards passed in 1991. 137 Cong. Rec. S15953, S15966 (daily ed. Nov. 5, 1991).

In their present appeal, the Wards Cove plaintiffs argue that Section 402(b) is unconstitutional and that new standards of proof adopted by the Civil Rights Act of 1991 retroactively apply to the ongoing Wards Cove litigation. Therefore *amicus curiae* Wards Cove Packing Company, Inc. is interested in the present consolidated cases.

II. SUMMARY OF ARGUMENT

The Wards Cove litigation offers an example of the extreme unfairness and enormous difficulties of the presumption of retroactivity. The case was tried eleven

years ago based on an evidentiary period that is a *generation* old. The losing litigants were active in seeking changes in the law in order to overturn this Court's decision in the case. The case is now on its fourth appeal to the Ninth Circuit and the appellant plaintiffs there argue that the Civil Rights Act of 1991 should be retroactively applied. The result of retroactive application of such new rules — whether they be labeled substantive or procedural — will protract litigation, waste judicial resources, and disturb reasonable expectations as to the finality of litigation. The presumption against retroactivity is the more just rule.

III. ARGUMENT

A. The Effects of Retroactivity Are Particularly Evident and Egregious as Applied to Cases Such as *Wards Cove*.

1. The History of the *Wards Cove* Litigation is as Instructive as it is Torturous.

That conduct should ordinarily be assessed under the law that existed when the conduct took place is a principle that has "timeless and universal human appeal."

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). An example of what may happen should this principle be subverted is found in the Wards Cove case, a particularly noxious eventuality noted by the District of Columbia Circuit in Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 890 (D.C. Cir. 1992):

> Given the potentially drastic impact of retroactivity of the disparate impact section on the Wards Cove defendants, it is not unthinkable that legislators wished to reassure the employers that they would not face recoveries of back pay plus interest from some time in the early 1970s for conduct committed twenty years or so before passage of the statute.

Briefly reviewing the convoluted history of the Wards Cove litigation is instructive.[6] In June 1969 plaintiffs Eugene Baclig and Gene Viernes first went to work for Wards Cove. Plaintiff Frank Atonio was first

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[6] As indicated above, Section 402(b) exempts the Wards Cove litigation from application of the Act. However, plaintiffs in Wards Cove now contend that Section 402(b) is unconstitutional and that the Act, therefore, should apply retroactively to the litigation.

employed by the company in June 1972. In October 1973 Atonio and three others filed a complaint against Wards Cove with the EEOC. A conciliation agreement based on the Commissioner's charge was entered between the EEOC and Wards Cove in February 1974. In March 1974 a complaint was filed by Frank Atonio and nine others against Wards Cove, Castle & Cooke (now Dole Food Company, Inc.) and their joint venture, Columbia Wards Fisheries. Wards Cove, supra, 490 U.S. at 647.

In February 1975, the District Court dismissed all Title VII claims against Wards Cove on the grounds that plaintiffs improperly identified defendant Wards Cove in the EEOC charges. This order was reversed on an interlocutory appeal immediately before trial in March 1982.[7]

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[7] Atonio v. Wards Cove Packing Co., Inc., 703 F.2d 329 (9th Cir. 1982). Plaintiffs took an earlier interlocutory appeal from the denial of a preliminary injunction in July 1977. The denial of injunction was affirmed by an unreported decision of the Ninth Circuit, No. 77 - 3006, 3007 (July 16, 1980).

In May 1982, after eight years of discovery, an intense twelve-day trial was held in district court at which over 100 witnesses testified. In October 1983, the district court entered judgment for the employers based on 172 findings of fact. The court dismissed all of plaintiffs' "disparate treatment" claims (intentional discrimination) and rejected as unproven most of the disparate impact challenges to the company's practices. With respect to so-called "subjective" employment practices, the court found they were not subject to attack under a disparate impact theory. Wards Cove, supra, 490 U.S. at 648.

The judgment for the employers was affirmed in all respects by the Ninth Circuit in August 1985, Atonio v. Wards Cove Packing Co., Inc., 768 F.2d 1120 (9th Cir. 1985), but that decision was vacated in November 1985 when the Court of Appeals agreed to hear one aspect of the case *en banc*. Wards Cove, supra, 490 U.S. at 648, citing Atonio v. Wards Cove Packing Co., Inc., 787 F.2d 462 (9th Cir. 1985). The *en banc* hearing was limited to the

question of whether subjective hiring practices should be examined under a disparate impact model. In February 1987, the *en banc* court held that the disparate impact analysis should be applied to such practices, reversing previous decisions of the circuit. The case was reassigned to the original panel. Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987).

In September 1987, the original panel did an about face on the impact analysis[8] and held plaintiffs had made out a *prima facie* case of unintentional discrimination in hiring. 827 F.2d 439 (9th Cir. 1987).[9] Wards Cove

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[8] The dismissal of disparate treatment claims was again affirmed: Atonio v. Wards Cove Packing Co., supra, 827 F.2d at 442. A petition for certiorari to review this dismissal was denied. 485 U.S. 989 (1988).

[9] The practical effect of the Ninth Circuit decision was to overrule existing Ninth Circuit authority and having found a *prima facie* case of disparate impact, to shift the burden of proof to the employer. Plaintiffs had argued the same evidence in support of both their disparate treatment and disparate impact theories. Under the disparate treatment model, the employer need only articulate a non-discriminatory reason to meet its burden of rebuttal (Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981)); however, under the Ninth Circuit's view the change in

sought review of the decision, and the case was argued before this Court in January 1989.

In June of that year, this Court reversed the Ninth Circuit on the well-established ground that statistical disparities between dissimilar classifications caused by an artificial oversupply of minorities in one job department are irrelevant to a proper disparate impact analysis. The Court went on to hold that the plaintiff always has the burden of persuasion, and the defendant may justify a practice causing disparity by showing that the practice was based on a legitimate employer goal. The case was remanded to inquire as to whether plaintiffs had established a *prima facie* disparate impact case on any other basis, besides their discredited statistics. Wards Cove, supra, 490 U.S. at 659-661.

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decisional law would have shifted the burden of persuasion to the employer using the disparate impact theory on the same evidence. Atonio v. Wards Cove Packing Co., supra, 827 F.2d at 439.

In January 1990, after denying plaintiffs' motion for further briefing, the Ninth Circuit Court of Appeals remanded the case to the District Court, which in January 1991 issued a new decision finding no disparate impact and dismissing plaintiffs' case. Plaintiffs again appealed, and in September 1992 the case was reargued before a new three-judge panel of the Ninth Circuit Court of Appeals.[10]

The view from 1993 of the Wards Cove litigation is of a case for which the at-issue events occurred more than two decades ago and which was tried eleven

[10] Plaintiffs in their appeal to the Ninth Circuit are contending that the 1991 Act has changed the requirements of proof necessary to establish a *prima facie* case of disparate impact and the proof required to justify the employer's practices. Defendants have argued that plaintiffs have insufficient evidence to establish a *prima facie* case under the new Act. The United States intervened in the case and argued that the Civil Rights Act of 1991 is not retroactive. U.S. Br. in Atonio v. Wards Cove Packing Co., No. 91-35306. The United States has now reversed its position. Infra, n.15.

years ago.[11] The employers have spent about $2 million on the litigation. 137 Cong. Rec. H3932 (daily ed. June 5, 1991). The case has been fully tried, argued on appeal six times, and reargued on remand in the district court. At no point has a court found that Wards Cove Packing Company or Dole Food Company discriminated against its employees.

2. If the Act is Applied Retroactively, A New Trial May be Required in a Case Already Two Decades Old.

The Wards Cove plaintiffs now urge on appeal that the "disparate impact" portions of the new law (Section 105(a)), be retroactively applied. Those provisions (1) allow a complaining party to establish that the elements of an employer's decision-making process are incapable of separate analysis and therefore may be analyzed as a whole, (2) place the burden of persuasion on the employer once a

[11] Commenting on the *thirteen*-year-old Title VII case before it, the court in Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1168 (5th Cir. 1978) called the action a "paleolithic museum piece." Using that standard, Wards Cove must be measured in geologic rather than mere anthropologic time.

prima facie disparate impact case is shown and (3) change this Court's standards as to the degree of proof necessary to justify a business practice that causes impact.[12] To get around the clear bar of Section 402(b), plaintiffs argue it is unconstitutional.

To carry the Wards Cove plaintiffs' arguments to their logical extreme would permit not only a new trial, but new discovery to ferret out evidence as to whether the elements of selection process were capable of separate analysis, discovery of evidence now more than

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[12] The Ninth Circuit has stated that the 1991 Act merely "return[s] the law to its previous posture." Estate of Reynolds v. Martin, 985 F.2d 470, 475 (9th Cir. 1993). However, it is presumptuous of the circuits to say that Wards Cove was more than a clarification of existing tensions within Griggs v. Duke Power Co., 401 U.S. 424 (1971). See, Supreme Court, Leading Cases, 103 Harvard Law Review 137, 350-361 (1989). It is, of course, not the function of the 1991 Congress to interpret the intent of the 1866 or 1964 Congresses. It is the function of Congress to declare contemporary policy based on politics rather than resolve a dispute between Congress and the Supreme Court. Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, 228 (7th Cir. 1992). And clearly the provision dealing with the challenges to selection practices as a whole (§ 105(a)) is entirely new.

twenty years old. A trial could not easily be recreated eleven years after it occurred and a generation after the case period began. For instance, the employers' principal witness as to the crucial labor market analysis, Dr. Albert Rees, is deceased. *New York Times* (Sept. 8, 1992). Two of the plaintiffs are dead. Many witnesses would be testifying to events that occurred half their lifetimes ago.[13]

3. The Potential of Retroactivity has Spurred Plaintiffs in *Wards Cove* to Retry Their Case in Congress.

The extent to which the Wards Cove plaintiffs will go to attempt to have Congress retry a case plaintiffs have been unsuccessful with in the courts was made evident during the passage of the Civil Rights Act of 1991. The plaintiffs themselves assiduously lobbied for particular language in and passage of the 1991 Act (and its predecessors) with the assistance of Senator Brock Adams,

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[13] In Mozee v. American Commercial Marine Service Co., 963 F.2d 929, 938 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992), the court stated that after fifteen years of litigation even a *remand* under a new statute is unjust.

whose former law firm (Garvey, Schubert, Adams and Barer) had been trial counsel for plaintiffs.[14] After negotiations taking a year and one-half, the leaders of the civil rights community, led by Senator Kennedy, finally reached an agreement with the Administration regarding civil rights legislation. 137 Cong. Rec. S15966 (daily ed. November 5, 1991). Section 402(b), exempting Wards Cove from the new standards of the Act had been a part of the compromise. No amendment was offered to strike that provision, as was the right of any member of Congress. Id. at S15966. But when the Senate approved the bill, it

[14] To counter the Atonio plaintiffs' efforts, Wards Cove Packing Co. lobbied Congress for an exemption of the Atonio case from the disparate impact provisions (only) of the Act. The Company's argument was grounded in common sense and simple justice: the evidence (as opposed to media opinion) had twice been examined and showed the Company did not discriminate; in fact, it hired more minority workers than the labor supply would predict. If any case should not have to go through the litigation wringer a third time, it was this one. That seventy-three senators voted for the exemption is testament to the basic fairness that the case be left alone by Congress.

omitted the section due to a mistake by legislative counsel. 137 Cong. Rec. S15953 (daily ed. November 5, 1991).

The bill making a technical correction to restore Section 402(b) to the Act was supported by the Act's prime sponsors, Senators Danforth and Kennedy. Id. at S15953. Senator Dole commented, "I must say, if we cannot make technical corrections around this place after somebody has made an agreement, we are never going to get anything done." Id. at S15953.

Nevertheless, seeing an opportunity to alter the Wards Cove litigation, Senator Adams rose in the Senate to argue against adoption of the technical resolution, S. Res. 214. His argument was rejected. With bipartisan support, Section 402(b) was restored, with 73 senators supporting the amendment. 137 Cong. Rec. S15967-8 (daily ed. November 5, 1991). But in March 1993, based on the Wards Cove plaintiffs' complaints, Congressman McDermott, a Washington Democrat, introduced the so-called "Justice for Wards Cove Workers Act" to remove

Section 402(b) from the Civil Rights Act of 1991 and undo the compromise reached only five months earlier.

4. Retroactivity Encourages Endless Litigation.

Plaintiffs' arguments regarding retroactivity are, then, an invitation for this Court to allow litigation to ride an infinite loop. A party wins at trial and on appeal. Then the losing party successfully lobbies to change the law, making it retroactive so that it alters the burden of proof or other component aspects of the case. A new trial and subsequent appeals follow. The losing party in this second round successfully lobbies Congress for new retroactive legislation requiring yet another trial and appeal. This scenario is not as farfetched as it first seems, given that the Wards Cove plaintiffs are well on their way to constructing it.

In its *amicus curiae* brief, the NAACP argues that since Congress has "repudiated" this Court's 1986-1991 decisions in the Act, the failure to apply the changes in law retroactively will deny the Act's protections to victims of

discrimination and will postpone the effective date of the legislation from 1991 to 2000. NAACP Brief at 8. However, under our legal process the fact of discrimination must be established by trial. As the NAACP concedes, civil rights litigation is notoriously long, complex and expensive. Id. at 7-8. Decades of attorneys' time, decades of the parties' time, decades of court time and millions of dollars may be spent in such litigation. Id. at 7. The concepts of due process and separation of powers are more important than the results of a given litigation. Defendant employers have a right to rely on the judicial process to determine claims, effectively and finally, without allowing plaintiffs new opportunities to obtain relief on the same claims with new theories, with changes in the burden of proof or with changes in the standards by which the employers' conduct is to be judged.

B. Language of the Act Does Not Support Petitioners; Section 402(b) Was Inserted on Behalf of Wards Cove As Insurance Against an Uncertain Construction of the Act.

It is argued by petitioners here that because Section 402(b) and Section 109(c)[15] specifically apply prospectively, it suggests Congress intended the balance of the Act to apply retrospectively. Only one Court of Appeals, the Ninth Circuit, has accepted this reasoning. Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992).

The other seven circuits have reached the common sense conclusion based on political reality that the clauses were nothing more than "insurance policies." For example, in Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir.

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[15] Section 109(c) provides that "[t]he amendments made by this Section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Pub. L. No. 102-166 § 109(c), 105 Stat. 1071 (1991), 42 U.S.C.A. § 2000e (West Supp. 1992). There seems to have been no floor debate whatsoever on § 109(c). Section 109 specifically overrules EEOC v. Arabian Amer. Oil Co., ____ U.S. ____, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) by providing that Title VII applies to U.S. citizens employed in foreign countries.

1992), the Fifth Circuit Court of Appeals concluded, "Congress may have wanted to ensure that certain retroactive applications of the statute were barred without intending to reach any general conclusion about the statute's general retroactive application." See also, Gersman, supra, 975 F.2d at 890 (where the D. C. Circuit said the two specifically prospective sections might be viewed as "insurance policies" of prospective application, rather than as redundancies); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) (opponents of retroactivity "'hedged their bets'" by specifically making two sections prospective only); Mozee, supra, 963 F.2d at 933; Butts v. City of New York, Dept. of Housing, etc., 990 F.2d 1397 (2d Cir. 1993).

Wards Cove Packing Company argued to Congress that its case had been tried, a decision rendered, and it was fundamentally unfair to allow plaintiffs to retry a case involving conduct which occurred in 1971 based on legal standards first created in 1991. Such retroactivity was akin

to asking employers in 1991 to govern their conduct by standards which Congress might create in 2011.

Until the final compromise version of the 1991 Civil Rights Act was crafted, every version of the bill introduced by proponents of the legislation was retroactive. Wards Cove asked that the bill be amended to include the language which became Section 402(b). Given the nature and content of the continuing appeals by the Wards Cove plaintiffs, when the final legislative compromise was being crafted, Wards Cove asked that Section 402(b) be included as an extra insurance policy in case plaintiffs could persuade a court that the Civil Rights Act of 1991, which was intended to be prospective, was, in fact, retroactive.

These conclusions are borne out by comments in Congress. Representative Hyde stated that Section 402(b) was "unnecessary" and "surplusage" and that it did "not accomplish or achieve a thing and it should not be the subject of so much excitation." 137 Cong. Rec. H9512 (daily ed. Nov. 7, 1991). Similarly, Senator Gorton said,

"The language in question does no more than reaffirm for one specific case the more general mandate of the bill that the civil rights amendments will be applied prospectively." 137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991). Senator Durenberger said that "the general clause that states that the bill is prospective is simply reinforced by this amendment that provides merely one example where the bill is prospective." Id. And Senator Murkowski said the section "should not be viewed as creating an implication regarding whether or not this legislation applies retroactively generally." 137 Cong. Rec. S15493 (daily ed. Oct. 30, 1991).[16]

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[16] Senator Murkowski also noted that a Congressional Act to actually change the result in Wards Cove might violate constitutional separation of powers. 137 Cong. Rec. S15954 (Nov. 5, 1992).

C. The Procedural/Substantive Distinction Suggested by the United States Fails to Cure the Inequities of Retroactivity Because Procedural Changes May Have Substantive Impact.[17]

The United States and the EEOC in their brief suggest that the retroactive application of the 1991 Act is justified because it is "procedural" and "remedial." (U.S. Br. 17).[18] They suggest that the Court adopt a procedural/ substantive bright line, arguing that it is not manifestly unjust to require a "wrongdoer" to bear costs (albeit

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[17] The United States, of course, has retroactively changed its position with the new policies of an Administration which came into office 13 months after passage of the 1991 Act.

[18] Terms such as "remedial", "restorative" and "procedural" may be viewed as euphemisms to obscure the true impact of change. See Orwell, "Politics and the English Language," Collection of Essays, Harcourt & Brace (1950), p. 363: "In our time, political speech and writing are largely the defense of the indefensible." He noted, for example, that imprisonment without trial may be described as "elimination of unreliable elements." Similarly Lou Fuller cautions against the temptation to accept retrospective laws when they merely cure "irregularities of form." He notes a retroactive statute passed by Hitler during the Roehm Purge which converted murders into legal executions. Fuller, The Morality of Law, Yale Press (1969), p. 54.

increased costs) caused by pre-Act conduct. (Id. 8). They concede, however that the distinction breaks down when the change in procedures may require a new trial (Id. 24, n.14). Implicit in this concession is the realization that even procedural changes may have substantive impact.[19] The circuits have struggled with this issue in a variety of contexts but, with the exception of the Ninth Circuit, have come generally to the same conclusion, namely, that whether labeled procedural or substantive, the changes affect substantive rights.[20]

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[19] "But such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Luddington, supra, 966 F.2d 225, 229. The Court of Appeals in the present case noted that a change in procedural rules should not invalidate procedures followed before the new rule was adopted. Landgraf v. USI Film Products, 968 F.2d 427, 433 (5th Cir. 1992), citing Belser v. St. Paul Fire & Marine Ins. Co., 965 F.2d 5, 9 (5th Cir. 1992) ("[N]ew procedural statutes do not ordinarily invalidate steps already taken under old law," citing Wilson v. General Motors Corp., 888 F.2d 779, 781 (11th Cir. 1989); Belanger v. Great American Indemnity Co., 188 F.2d 196, 198 (5th Cir. 1951)).

[20] Not retroactive: Mozee, supra, 963 F.2d 937 (case had been tried); Butts, supra, 990 F.2d at 1397 (cause of action if any arose pre-Act); Johnson, supra, 965 F.2d at

Some sections of the new Act could be called "procedural" e.g. right to jury trial (§ 102); right to compensatory or punitive damages (§ 102); recovery of expert witness fees (§ 113); commencement of statute of limitation (§ 114); prejudgment interest (§ 114). Others are arguably "substantive" e.g. creation of a cause of action for post-hire conduct (§ 101); expansion of right to challenge seniority systems (§ 112); prohibition of race-norming test scores (§ 106). However, *all* sections have substantive impact. For example, the increase in potential liability to include compensatory and punitive damages (§ 102) clearly has substantive impact (§ 102).

1373 (case in litigation 18 years); Landgraf, supra (amended damages a sea change in employer liability and a retrial would be a manifest injustice); Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992) (a new statute of limitation is arguably substantive); Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992) (case already tried and litigated two and a half years); Gersman, supra, 975 F.2d 886 (pre-Amendment conduct); Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992) (prejudgment interest); but see, *retroactive*: Estate of Reynolds, supra, 985 F.2d at 470 (prejudgment interest); Davis, supra, 976 F.2d at 1536 (expert witness fees).

None of the circuits has expressed a preference for a substantive/procedural bright line. That they have analyzed the retroactivity issues somewhat differently suggests that such a distinction is difficult in application.

In the two cases before this Court the circuits have both indicated a preference for prospective application.[21] The panel in Landgraf, however, did not find it necessary to ground its decision on a general presumption because it found a new trial and substantially increased exposure to damages would be manifestly unjust. 968 F.2d 427, 433.

The Second, Seventh, Eleventh and District of Columbia Circuits have applied the presumption in Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988), to the facts of the cases.[22]

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[21] See also Johnson, supra, 965 F.2d at 1375; Vogel v. City of Cincinnati, 959 F.2d 597 (6th Cir. 1992).

[22] Butts, supra, 980 F.2d 1397; Mozee, supra, 963 F.2d 929 (7th Cir.); Gersman, 975 F.2d 886; Baynes, supra, 976 F.2d 1370.

The Sixth and Eighth Circuits have held the Act as a whole is not retroactive.[23] The Eighth Circuit *en banc* concluded that a case-by-case application of Bradley v. School Board, 416 U.S. 696 (1974), would be unworkable. Hicks v. Brown Group, 982 F.2d 295, 298 (8th Cir. 1992) (*en banc*). The Sixth Circuit held against retroactivity on the ground that as a whole the Act would affect substantive rights. Harvis v. Roadway Exp., 973 F.2d 490, 497 (6th Cir. 1991). Judge Posner in Luddington, although limiting the holding to cases commenced before the Act, reasoned that:

> Retroactive application carefully tailored to situations (quite possibly illustrated by this case) in which those reliance interests are minimal would engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary.

[23] Vogel, supra, 959 F.2d 594; Harvis, supra, 973 F.2d 490; Fray, supra, 960 F.2d at 1377; Hicks, supra, 982 F.2d at 298.

966 F.2d at 229. Accordingly, this Court should clarify the Bowen/Bradley tension, fix a distinct boundary and adopt the more just rule.

D. The 1991 Act Was Passed as a Compromise After Clearly Retroactive Similar Legislation Had Been Rejected.

Although comments in Congress as to retroactivity may be inconclusive, in this instance, deeds rather than words are telling. The Civil Rights Act of 1990 contained a section explicitly providing for retroactive application of the Act. Civil Rights Act of 1990, Section 15, reported in H. Rep. No. 101-644, Part 1, 101st Congress, 2nd Sess. (1990).[24] The President vetoed the bill, and his veto message specifically singled out "unfair retroactivity rules" as a reason for the veto. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990,

[24] For example, Section 15(a)(6) of the Civil Rights Act of 1990 provided that the counterpart to Section 101(2)(b) of the Civil Rights Act of 1991 would apply to all cases pending on or commenced after June 15, 1989, the date of the decision in Patterson, supra. See 136 Cong. Rec. S9968 (daily ed. July 18, 1990).

26 Weekly Comp. Pres. Doc. 1632, 1634 (Oct. 22, 1990). The veto could not be overridden. Bipartisan sponsors in the Senate drafted a bill, S.1745, that deleted the 1990 bill's provisions regarding retroactivity. See 137 Cong. Rec. 15503-12 (daily ed. Oct. 30, 1991). The Congress "knew from their 1990 experience that because of the President's veto power, they could not enact a law that purported to legislate retroactivity." Fray, supra, 960 F.2d at 1377 (emphasis by court). The floor debate in both chambers emphasized that it was necessary to pass a bill the President would sign. See, e.g. 137 Cong. Rec. S15344 (daily ed. Oct. 29, 1991) (statement of Senator Kennedy); 137 Cong. Rec. H9515 (daily ed. Nov. 7, 1991) (statement by Speaker of the House Foley).

That deleting the retroactivity rules was a major reason the President signed the 1991 Act, whereas he refused to sign the 1990 Act, was made clear in the President's statement upon signing the 1991 Act, in which he instructed all executive branch officials to follow "as

authoritative interpretive guidance" the memoranda of law inserted into the Congressional Record by Senator Dole which stated, among other things, that the 1991 Act was not retroactive. Statement of President George Bush Upon Signing S.1745, 1991 U.S.C.C.A.N. 768, 769 (Nov. 21, 1991) (adopting memoranda at 137 Cong. Rec. S15472 (daily ed. Oct. 30, 1991) and 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991)). When Congress omits in a later version of a bill a provision in an earlier bill criticized by the President upon vetoing the earlier bill, the omission in the later bill demonstrates Congress' abandonment of the position taken in the omitted provision. Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Rel. Bd., 340 U.S. 383, 392, n.15 (1951).

Congress clearly knew the words to use if it intended to make the statute retroactive. Omitting the retroactivity provisions in the 1991 version of the Act was part of the compromise that allowed the Act to gain bipartisan support

and prompted the President to sign the bill into law. This history of the Act is unambiguous: a bill requiring retroactivity that failed to become law was followed a year later by a bill omitting the requirement of retroactivity. The intent of the legislature was clearly that the Civil Rights Act of 1991 apply prospectively only.

The Ninth Circuit is the only appeals court to find the Act retroactive. In Davis, supra, 976 F.2d at 1536, the Court said Section 109(c) and Section 402(b) comprised strong evidence of legislative intent that the Act was to apply retroactively in all circumstances. The Court noted that prospective application of the Act would render the two sections superfluous. The Court also said that because Congress explicitly intended to reverse several Supreme Court decisions where Congress thought the Court construed several statutes too narrowly, it was likely "Congress intended the courts to apply its new legislation, rather than the Court decisions which predated the Act, for the benefit of the victims of discrimination still before

them." Id. at 1552. But in neither Davis nor Estate of Reynolds, supra, 985 F.2d at 470 did the Ninth Circuit decide that plaintiffs were victims of discrimination because of new law. In both cases that determination was already made on the basis of prior law. Davis added expert witness fees and Estate of Reynolds added pre- and post-judgment interest to awards already made under prior law. Thus the language of both decisions is broader than the issues posed. None of the circuits has adopted a rule which would overturn a ruling on liability.

E. The Presumption Against Retroactivity is the More Established and the More Just Doctrine.

"The bias against retroactive laws is an ancient one." Smead, The Rule Against Retroactive Legislation, a Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936). Justice Scalia noted in his concurring opinion in Kaiser Aluminum, supra at 855, that the presumption of prospective application is rooted in history and tradition. Noting that the principle was recognized by the Greeks, the

Romans, by English common law, and by the Code of Napoleon, he said "It has long been a solid foundation of American law." Kaiser Aluminum, id. He quoted Justice Story:

> [R]etrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact.

Id. (quoting J. Story, Commentaries on the Constitution § 1398 (1851)).[25] In United States v. Security Industrial

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[25] An extensive list of early cases where the Supreme Court said laws are presumed to act prospectively is found in Smead, supra, at 781 n.22. The author summarized:

> American commentators and courts also viewed [the principle] as based on the same concepts of justice and jurisprudence of which the English common law held it to be an expression. Retroactive laws were held to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future. The United States Supreme Court has stated expressly that retrospective legislation would not be favored, that such laws were contrary to American jurisprudence, and that the court, in the absence of an express command or "necessary implication" to the contrary will preserve that a law is designed to act prospectively. [Footnotes omitted.]

Bank, 459 U.S. 70, 79 (1982) decided after Bradley, the court quoted from United States Fidelity & Guaranty v. United States ex rel. Struthers Wells Co., 209 U.S. 306, 314 (1908): "'The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.'"[26] Justice Scalia, concurring in Kaiser Aluminum, supra at 855, also indicated that the presumption of prospective application was based on notions of fairness in that parties to a suit should only be held accountable for the laws at the time of their conduct. As the Court of Appeals for the Second Circuit said in Butts, supra, 990 F.2d at 1409, "While the Ex Post Facto Clause of Article I, Section 9 of the United States Constitution applies only to criminal statutes, the fundamental principal animating that clause, that persons be given an opportunity to conform their

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[26] See also authority collected in Bowen, supra, 488 U.S. at 208.

conduct to the law before incurring its sanctions, is equally applicable to civil cases."[27]

In addition, there are compelling reasons to give parties a reasonable expectation of the finality of litigation. Every trial lawyer should expect to play by the rules — procedural or substantive — in effect at the time of trial. The cost and risk of litigation should not be subject to the subsequent political process.

IV. CONCLUSION

A lofty ambition of the law is to settle expectations. To make plain the relations of our citizens is the very purpose of the legislative and judicial processes. A house is not built on shifting sands, and neither should the hopes of

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[27] Retroactive application of legislation to a particular case also raises separation of powers and due process concerns. Rights vest in a judgment. The power of a legislature to disturb by subsequent legislation the substantive rights vested by the judgment is constitutionally restricted. McCollough v. Virginia, 172 U.S. 102, 123-124 (1898); Hodges v. Snyder, 261 U.S. 600, 603 (1923). Further, the right to decide cases free from domination by other branches of government is inherent in judicial power. Northern Pipeline Const. Co. v. Marathon Pipe Co., 458 U.S. 50, 58 (1982).

those who seek redress in the courts. By arguing that the Civil Rights Act of 1991 applies to cases pending when the Act was enacted, petitioners seek to judge events long passed by the standards of those currently best able to manipulate the legislative process. This Court should reject their arguments and hold that the Act does not apply to cases pending when the legislation was passed.

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